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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. May a dealer termination case go to the jury on a price-fixing charge when there is: undisputed evidence of the termination's procompetitive benefits; no direct evidence of an understanding concerning price; and, at most (according to the Court of Appeals), only "weak" circumstantial evidence from which a price understanding might be inferred?

2. In holding that such a case must go to the jury, does the decision below depart from the standards established in *Monsanto Company* v. *Spray-Rite Service Corporation*, 104 S. Ct. 1464 (March 20, 1984), and frustrate the economic objectives which this Court sought to promote in *Monsanto*?

3. If such a case can go to the jury, should the rule of reason, rather than the *per se* rule, be applied?

LIST OF PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals for the Ninth Circuit are those listed in the caption of this Petition and Mazel Corporation and Copper State Distributors, Inc. The Buckingham Corporation is a wholly owned subsidiary of Beatrice Worldwide, Inc., which in turn is owned by Beatrice Companies, Inc. and Beatrice Beverage Holding Co.*

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* A list of The Buckingham Corporation's affiliates is annexed as Appendix A.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of Parties in the Court of Appeals	ii
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Statement of the Case	3
The Parties	3
Buckingham's Choice of Copper State as its Exclusive Distributor	3
Proceedings Below	5
The District Court	5
The Court of Appeals' First Decision	6
The Court of Appeals' Decision After *Monsanto*	7
Reasons for Granting the Writ	7
I. The Ninth Circuit's Decision Conflicts Directly with *Monsanto*	9
II. The Decision Below Frustrates the Economic Objectives *Monsanto* Sought to Achieve	10
III. The Rule of Reason, Rather Than the *Per Se* Rule, Should Be Applied in Any Trial	13
Conclusion	16

PAGE

Appendices:

A. List of Affiliates of The Buckingham Corporation 1a

B. 1984 Order of the Court of Appeals..... 7a

C. 1983 Memorandum Opinion of the Court of Appeals..... 10a

D. Transcript of Oral Opinion of the District Court 14a

E. Judgment of the District Court 18a

F. Text of Braddock Letter 20a

G. Text of Ahlburg Memorandum 22a

H. Trial Testimony of Ken Ahlburg 23a

I. Order of the United States Supreme Court 26a

TABLE OF AUTHORITIES

Cases: PAGE

A.H. Cox & Co. v. *Star Machinery Co.*, 653 F.2d 1302 (9th Cir. 1981) 11

Broadcast Music, Inc. v. *C.B.S.*, 441 U.S. 1 (1979) 15

Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) 11, 15

Dr. Miles Medical Co. v. *John D. Park & Sons*, 220 U.S. 373 (1911) 14, 15

Edward J. Sweeney & Sons, Inc. v. *Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) 12

Filco v. *Amana Refrigeration, Inc.*, 709 F.2d 1257 (9th Cir.), *cert. dismissed*, 104 S. Ct. 385 (1983) 9

Monsanto Company v. *Spray-Rite Service Corporation*, 104 S. Ct. 1464 (March 20, 1984) ..... *passim*

National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 15

Northern Pac. Ry. Co. v. *United States*, 356 U.S. 1 (1958) 15

Roesch, Inc. v. *Star Cooler Corp.*, 671 F.2d 1168 (8th Cir. 1982), *aff'd*, 712 F.2d 1235 (8th Cir. 1983) (*en banc*), *cert. denied*, 104 S. Ct. 1707 (1984) 11

Schlude v. *Commissioner of Internal Revenue*, 372 U.S. 128 (1963) 8

United States v. *Container Corporation of America*, 393 U.S. 333 (1969) 14

United States Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) 2

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 15

PAGE

Statutes:

15 U.S.C. § 1 3

15 U.S.C. § 15 2

15 U.S.C. § 26 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 2

28 U.S.C. §§ 2201-02 2

Miscellaneous:

Attorney General William French Smith's Remarks to District of Columbia Bar, Antitrust & Trade Reg. Rep. (BNA) slip no. 1021, H-1 (July 2, 1981) 14

Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* 75 Yale L.J. 373 (1966) .. 14

Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, filed Jan. 3, 1983, *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (U.S.) .. 14

Interview with Thomas J. Campbell, Director of Bureau of Competition, 43 Antitrust & Trade Reg. Rep. (BNA) slip no. 1074, 238 (July 22, 1982) 14

Justice Drops Vertical Price Fixing, Mergers Cases Begun Within Last Year, Antitrust & Trade Reg. Rep. (BNA) slip no. 1022, A-7 (July 9, 1981) 14

New England Conference Probes Trends in Antitrust Enforcement, 47 Antitrust & Trade Reg. Rep. (BNA) slip no. 1189, 848 (Nov. 8, 1984) 14

Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981) 12, 14

PAGE

Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1 (1977) 14

Scherer, *The Economics of Vertical Restraints*, 52 Antitrust L.J. 687 (1983) 14

Schwartz & Eisenstadt, *Vertical Restraints* (Antitrust Division Economic Policy Office Discussion Paper 1982) 14

Vertical Restraints Can Increase Consumer Welfare: Antitrust Official, Trade Reg. Rep. (CCH) slip no. 516, 4 (November 16, 1981) 14

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THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, The Buckingham Corporation ("Buckingham"), asks that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit, entered in this case on August 7, 1984.

This case is already familiar to the Court. On April 2, 1984, this Court granted Buckingham's petition for a writ of certiorari to review a 1983 order of the Ninth Circuit which held that a terminated dealer's evidence at trial was "weak" but sufficient to go to a jury. The judgment below was vacated and the case remanded for reconsideration in light of *Monsanto*

Company v. *Spray-Rite Service Corporation*, 104 S. Ct. 1464 (March 20, 1984). Rather than reassess the evidence under the newly articulated standard in *Monsanto*, the court below—over the dissent of Judge Poole—merely reinstated its initial memorandum disposition of the case. In so doing, the Court of Appeals not only failed to follow *Monsanto*, but also undermined the important economic objective of that decision—to prevent the threat of treble damage liability, based on weak evidence of vertical price communications, from inhibiting procompetitive dealer terminations.

Opinions Below

The August 1984 decision and order of the Court of Appeals (the "1984 Order"), not officially reported, is annexed as Appendix B. The earlier memorandum opinion of the Court of Appeals, dated February 25, 1983 (the "1983 Opinion"), not officially reported, is annexed as Appendix C. The portions of the transcript of proceedings containing the oral opinion of the United States District Court for the District of Arizona (Hardy, J.) are annexed as Appendix D. The judgment of the District Court is annexed as Appendix E.

Jurisdiction

The judgment of the Court of Appeals was entered on August 7, 1984. A timely Petition for Reconsideration or Rehearing with a Suggestion of Rehearing *En Banc* was denied on September 28, 1984. This Petition is filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. §§ 15 and 26, 28 U.S.C. §§ 1331, 2201 and 2202, and the doctrine of pendent jurisdiction, *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Statute Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Statement of the Case

The Parties

Buckingham is the United States importer of several brands of wines and spirits, the most important of which is Cutty Sark Scotch Whisky. For many years prior to August 1981, Buckingham distributed its products in Arizona through two wholesalers, Arizona Distributing Company ("ADC") and Copper State Distributors, Inc. ("Copper State").

Buckingham's Choice of Copper State as its Exclusive Distributor

Buckingham's practice of selling its products through two wholesalers put Buckingham at a distinct disadvantage in the highly competitive Arizona market where virtually all wines and liquors were sold through exclusive wholesalers. ADC's president, Braddock, acknowledged this fact in a letter to Buckingham in March 1980:

> "I have always felt that the dual items suffer from a lack of salesmen's interest. There are only a handful of dual items in this market and the salesman always has an exclusive item to push in place of any brand which also may be handled by a competitor. * * * I am also sure that Cutty Sark sales could be increased by 10 to 15%, if we

were the exclusive distributor. * * * . . . [O]ur state is not a healthy environment for dual merchandise. . . ."[1]

During the summer of 1980, Buckingham brought in new management in an attempt to revive the floundering Cutty Sark brand. The new management began to evaluate and compare the two Arizona wholesalers in January 1981 in order to select one as exclusive distributor. Several factors led to the conclusion that ADC lacked commitment to Buckingham's brands and that Copper State was more willing to promote them.

First, Copper State won a contest to become Buckingham's exclusive wine distributor in Arizona. It won because it sold far more wine than ADC during the 3-month contest period.

Second, Copper State's comparative sales performance figures were consistently higher than ADC's, apart from a brief and temporary leap in ADC's sales caused by an unprecedented 10-day discount in April 1981. Usually Copper State's prices were lower than ADC's.

Third, Buckingham learned that ADC's president had testified in December 1980 in another action that he considered Cutty Sark an unprofitable but "necessary evil" that he would get rid of when he could obtain another prestige Scotch to replace it.

Finally, Copper State's chief executive, Gellerman, had persistently displayed his commitment to promoting the Buckingham brands.

On August 6, 1981, Buckingham made the only choice it could to improve its competitive position in the Arizona market—it terminated ADC.

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1 The full text of Braddock's letter is annexed as Appendix F.

Proceedings Below

The District Court

ADC claimed in the District Court that its termination was the result of a conspiracy between Buckingham and Copper State to fix prices. Its claim was based entirely upon a handful of innocuous communications during the 10 days in April 1981 when ADC's unprecedented discount occurred. At the most, there was a complaint by Gellerman and a few communications between Buckingham and the two distributors in an effort to resolve the confusion caused by the unprecedented price cut.

There was no evidence that Buckingham in any way suggested the actual price charged by ADC or Copper State for Buckingham's brands.[2] There was no evidence that Gellerman and Buckingham ever discussed future prices or that Buckingham made any requests concerning prices. Nor was anything said in meetings between Braddock and Buckingham personnel from which a threat of termination could be implied.

ADC also relied on a memorandum written on April 29, 1981, by Ken Ahlburg, Buckingham's Western Division Manager, to Buckingham's Senior Vice President of Sales outlining his reasons for recommending Copper State as exclusive distributor.[3] While the memorandum discusses the April discount—among other factors unrelated to pricing—nothing in it suggests coercion or a pricing agreement.

At the close of ADC's case, the District Court, concluding that "there is no evidence to show that these parties acted in

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2 The net wholesale price is the price listed by the wholesaler, minus a discount dependent upon the number of cases purchased. Buckingham suggested list prices for its products, but it never suggested discounts for Cutty Sark or its wines sold in Arizona.

3 The full text of the Ahlburg memorandum is annexed as Appendix G.

concert . . .," directed a verdict dismissing ADC's price fixing claims. The court observed that if this type of evidence could support an antitrust violation, Buckingham would be "in a Catch 22 situation." If ADC could get to a jury because of Copper State's complaints about its discount, Copper State could also get to a jury if it were terminated; it could argue that, because of its consistently lower prices, which displeased Braddock, ADC was chosen as the exclusive distributor. (App. D, p. 17a) Buckingham might then be forced to choose the anticompetitive alternative of keeping both wholesalers rather than risk a treble damages judgment.

The Court of Appeals' First Decision

Ignoring Buckingham's dilemma, the Court of Appeals reversed. It conceded that ADC's evidence was "weak," but held that "there was sufficient circumstantial evidence to withstand the motion for a directed verdict." (App. C, p. 11a) It did not specify the standard it had applied in reaching this conclusion. The Court cited two pieces of evidence which it considered sufficient to take the case to the jury: (1) the "Ahlburg Memorandum" (App. G)—even though it contained no suggestion of an agreement, and (2) Gellerman's offer at a meeting with Ahlburg to make a "commitment" in exchange for the exclusive distributorship—even though Gellerman made no mention of price.[4]

While relying on evidence which bore absolutely no relation to price fixing, the Court of Appeals ignored the most telling piece of evidence in the case—the Braddock letter in which ADC's president admitted that it would be in Buckingham's competitive self-interest to terminate one of its wholesalers. Apparently, the Court believed that evidence of procompetitive benefits was not pertinent to determining whether there was sufficient evidence of a conspiracy to fix prices.

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4 The full trial testimony concerning this "commitment" is annexed as Appendix H.

The Court of Appeals' Decision after *Monsanto*

Buckingham petitioned this Court for a writ of certiorari to review the 1983 Opinion, pointing out that this case would assist the Court in resolving definitively the questions presented in *Monsanto*, then pending before the Court.

Two weeks after the decision in *Monsanto*, this Court granted Buckingham's petition, vacated the judgment of the Ninth Circuit and remanded the case for reconsideration in light of *Monsanto*. Costs were awarded to Buckingham.[5]

On remand, the Court of Appeals—over the dissent of Judge Poole—simply reinstated its initial memorandum disposition of the case. Rather than reassess the evidence under the newly articulated standard in *Monsanto*, the Court stated that its prior order had already applied that test. Judge Poole, who did address the evidence considered in the 1983 Opinion, found:

> Though before *Monsanto* such evidence may have been thought sufficient to withstand a directed verdict, I believe the Supreme Court's most recent decision requires more. (App. B, p. 9a)

The panel denied Buckingham's petition for rehearing.

REASONS FOR GRANTING THE WRIT

We are not asking this Court to review a decision that merely raises the question of whether a recently enunciated standard has been correctly applied. A good deal more is involved here.

First, the Court of Appeals, in reinstating on remand its vacated disposition of the case, disregarded this Court's mandate to reconsider the evidence below in light of *Monsanto*. The 1983 Opinion totally ignored undisputed evidence that it

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5 This Court's order, reported at 104 S. Ct. 1699 (April 2, 1984), is annexed as Appendix I.

was in Buckingham's competitive self-interest to terminate one of its distributors—to use an exclusive distributor as all of its competitors did. The Court of Appeals plainly could not have applied the test announced in *Monsanto* that for a case to get to a jury "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 104 S. Ct. at 1471.[6]

Moreover—and more important—the Court of Appeals' decision undermines the important economic objective this Court sought to achieve in *Monsanto*. The rigorous standards set forth in *Monsanto* for inferring a vertical price-fixing conspiracy were expressly designed to allow a supplier to make an efficient change in its distribution system without undue risk of treble damage exposure. The decision below thwarts that purpose. No matter what *Monsanto* may say, suppliers who have discussed prices with dealers (which *Monsanto* permits), or who have received complaints about price cutters (which *Monsanto* recognizes as inevitable), will have cause to fear treble damage judgments in favor of terminated dealers if evidence as meager as that introduced here must be presented to a jury. The result will be that many inefficient distribution systems will remain unchanged because such suppliers are likely to follow the conservative—but non-competitive—course of maintaining the status quo.

This Court should now grant review not only to correct the error of the Court of Appeals, but also to insure that the objectives of *Monsanto* are achieved in the real world.

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6 This Court has granted certiorari twice in the same case to review a lower court decision after remand in order to insure that a recent decision of this Court was correctly followed. *See, e.g., Schlude* v. *Commissioner of Internal Revenue*, 372 U.S. 128, 129-30 (1963).

I.

The Ninth Circuit's Decision Conflicts Directly with *Monsanto*

The Court of Appeals' 1983 Opinion concluded that ADC's evidence, although "weak," was sufficient to take the case to a jury. The Circuit Court did not, however, define the standard for inferring a price-fixing conspiracy which it had applied. The 1984 Order merely stated in retrospect that the 1983 Opinion had followed the same test that was subsequently enunciated in *Monsanto*. But the evidence in the case—and the reasoning of the Ninth Circuit itself—demonstrates that the decisions below directly conflict with *Monsanto*.

In *Monsanto*, this Court rejected the rule previously adopted by the Ninth Circuit[7] that a price-fixing agreement may be inferred "from the fact that termination came about 'in response to' complaints." 104 S. Ct. at 1470. Instead, expressly recognizing the anticompetitive consequences of inferring concerted action from "highly ambiguous evidence," this Court announced a new standard: "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 104 S. Ct. at 1471. The undisputed evidence in *Buckingham* demonstrates conclusively that Buckingham had independent procompetitive reasons for terminating ADC. The Ninth Circuit therefore could not have followed the *Monsanto* standard.

The 1983 Opinion itself recognized that Buckingham had "presented evidence that it terminated ADC in its independent discretion and for legitimate business reasons unrelated to price." (App. C, p. 11a) This evidence included: the desire of Buckingham's new management to upgrade the Cutty Sark image; Copper State's victory in the wine contest; Copper State's comparative sales performance figures; the hostility

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7 *See Filco* v. *Amana Refrigeration, Inc.*, 709 F.2d 1257 (9th Cir.), *cert. dismissed*, 104 S. Ct. 385 (1983).

against Buckingham shown in the testimony of ADC's president in another action; and Gellerman's display of commitment to promoting the Buckingham brands. (App. C, p. 11a)

Moreover, the Ninth Circuit ignored entirely the most probative piece of evidence on the conspiracy issue: the letter from ADC's president which admitted that the existing distribution system for Buckingham's products in Arizona—*i.e.*, two wholesalers serving the same geographical market—was inefficient and that Buckingham had a competitive need to terminate one of its wholesalers. (App. F) The Court of Appeals' failure even to consider this critical piece of evidence reveals that the court believed—erroneously—that evidence of procompetitive benefits was not pertinent to determining whether there was sufficient evidence of a price-fixing conspiracy. The Circuit Court's decision that a conspiracy may be inferred in the face of undisputed evidence that a termination was in the supplier's competitive self-interest squarely conflicts with *Monsanto*.

This Court should not allow such disregard of the standard which it has mandated for inferring a vertical price-fixing conspiracy and which it specifically ordered the Court of Appeals to apply in this case.

II.

The Decision Below Frustrates the Economic Objectives *Monsanto* Sought to Achieve

The central aim of the *Monsanto* decision was to give suppliers the freedom to make their distribution systems operate more efficiently. To this end, the Court sought to establish a clear and relatively stringent standard that would not subject a supplier to the risk of jury-imposed treble damages based on "highly ambiguous" evidence of pricing decisions by the supplier and routine price communications between it and its dealers. 104 S. Ct. at 1470. This Court recognized that treble damage exposure inhibits suppliers from

making their distribution systems more competitive—a result precisely the opposite of what the antitrust laws are designed to achieve. By permitting admittedly "weak" evidence of a price-fixing agreement to be presented to a jury, in the face of uncontradicted evidence of the termination's procompetitive benefits, the *Buckingham* decision creates the very inhibitions *Monsanto* sought to erase.

A lenient standard for inferring a price-fixing conspiracy in vertical cases may deter or penalize procompetitive conduct in two ways. First, an easy transition from communications between suppliers and wholesalers to *per se* illegality will chill necessary dialogue. In this Court's words,

> "A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market. . . . [I]n order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market." 104 S. Ct. at 1470.

Accord Roesch, Inc. v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982), *aff'd*, 712 F.2d 1235 (8th Cir. 1983) (*en banc*), *cert. denied*, 104 S. Ct. 1707 (1984).

Second, with the threat of treble damages hanging over its head, a supplier will frequently dare not risk making its distribution system more competitive. It is well recognized that "[c]ompetition is promoted when manufacturers are given wide latitude in establishing their method of distribution and in choosing particular distributors." *A.H. Cox & Co.* v. *Star Machinery Co.*, 653 F.2d 1302, 1306 (9th Cir. 1981); *see Monsanto*, 104 S. Ct. at 1470; *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977). Yet suppliers must make decisions in the real world. Before a supplier can make an efficient change in its distribution system, including ceasing

sales to a particular distributor, it must address the practical question of whether as a consequence of price discussions the terminated distributor may be able to get a price-fixing claim before a jury. If the answer to this question is "yes"—or even "maybe"—the supplier is likely to forego a procompetitive change in its method of distribution.

Thus, this Court stressed in *Monsanto* that

> ". . . it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to *per se* treatment and treble damages. . . . If an inference of such an agreement may be drawn from highly ambiguous evidence, there is considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded." 104 S. Ct. at 1470.

Exposing a supplier to treble damage liability "could deter or penalize perfectly legitimate conduct." *Id. Accord Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 n.2 (3rd Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 13 (1981).

The decision below puts Buckingham in an insoluble predicament. Both Copper State and ADC had engaged in at least some price cutting—ADC for 10 days in April 1981 and Copper State consistently over several years. In each case, the higher priced wholesaler complained. Thus, either Copper State or ADC would have been able to argue that it was terminated as a result of its price-cutting efforts and the supplier's communications with the other wholesaler. Since the Court of Appeals held that there was enough evidence to infer a price-fixing agreement, despite the undisputed evidence that Buckingham was at a competitive disadvantage because it did not have an exclusive wholesaler, Buckingham's only safe

option is the anticompetitive one—terminate neither distributor and perpetuate the inefficient *status quo*.

If the Ninth Circuit's decision is allowed to stand, many suppliers will face the same dilemma as Buckingham—the very dilemma *Monsanto* was intended to resolve. This Court should grant certiorari to ensure that the economic objective underlying its decision in *Monsanto* is not thwarted in this way.

III.

The Rule of Reason, Rather Than the *Per Se* Rule, Should Be Applied In Any Trial

If there is to be another trial, we urge this Court to direct that the rule of reason, rather than the *per se* rule, be applied in determining whether there was any antitrust violation.[8]

The decision below demonstrates the adverse economic consequences of applying a lenient and imprecise standard for inferring a price-fixing conspiracy in a vertical context. This anticompetitive impact will be compounded if, once a conspiracy is inferred, the *per se* rule comes into play. The conjunction of an easy inferrence of concerted action with the *per se* rule permits a doubly drastic result in cases like this—the leap from routine price communications between a supplier and its wholesalers to treble damage exposure, without any opportunity for the supplier to show that its price communications were reasonable. If procompetitive conduct may be the basis for conclusively finding an illegal conspiracy under the *per se* rule, the inhibitions that *Monsanto* sought to alleviate will be intensified.

It has become increasingly well recognized in recent years that, since resale price maintenance is frequently procompeti-

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8 Buckingham argued in its initial petition for certiorari, as well as in the district court, that its termination of ADC should be evaluated under the rule of reason. In *Monsanto*, this issue was not raised below. 104 S. Ct. at 1469-70 n.7.

tive, the *per se* rule should not apply to vertical price restrictions.[9] Where horizontal price communications are at issue, it is consistent with antitrust policy to combine a lenient standard for inferring concerted action with the *per se* rule since such communications are rarely legitimate. *E.g.*, *United States* v. *Container Corporation of America*, 393 U.S. 333, 337 (1969). But, as this Court noted in *Monsanto*, this is not so in vertical cases. Unlike horizontal communications, dialogue between suppliers and wholesalers is necessary to maintain efficient systems of distribution. Conduct which economic and judicial experience has shown does not invariably have a "pernicious effect on competition" or lack "any redeeming [competitive]

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9 Prominent commentators, as well as senior Justice Department and Federal Trade commission officials, have critized the rule in *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373 (1911). *See* Scherer, *The Economics of Vertical Restraints*, 52 Antitrust L.J. 687 (1983); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 8-14 (1981); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1 (1977); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L.J. 373 (1966); Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, filed Jan. 3, 1983, at 15-8, *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (U.S.); *Attorney General William French Smith's Remarks to District of Columbia Bar*, Antitrust & Trade Reg. Rep. (BNA) slip no. 1021, H-1, at H-2 (July 2, 1981); *Justice Drops Vertical Price Fixing, Mergers Cases Begun Within Last Year*, Antitrust & Trade Reg. Rep. (BNA) slip no. 1022, A-7, at A-8 (July 9, 1981) (William Baxter, Assistant Attorney General, Antitrust Division); *Vertical Restraints Can Increase Consumer Welfare: Antitrust Official*, Trade Reg. Rep. (CCH) slip no. 516, 4 (November 16, 1981) (Ronald Carr, Deputy Attorney General Antitrust Division); Schwartz & Eisenstadt, *Vertical Restraints* 31-50 (Antitrust Division Economic Policy Office Discussion Paper 1982); *New England Conference Probes Trends in Antitrust Enforcement*, 47 Antitrust & Trade Reg. Rep. (BNA) slip no. 1189, 848, at 849 (Nov. 8, 1984) (Terry Calvini, Commissioner, Federal Trade Commission); *Interview with Thomas J. Campbell, Director of Bureau of Competition*, 43 Antitrust & Trade Reg. Rep. (BNA) slip no. 1074, 238 (July 22, 1982);

virtue," *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, *supra*, 433 U.S. at 49-50, should not be condemned as *per se* unlawful—particularly where evidence of a conspiracy is as ambiguous as that below.[10]

In light of the undisputed procompetitive benefits of the termination here, we submit that this case provides an ideal and important opportunity for the Court to consider the interconnection between the rule of *Dr. Miles* and the standard for inferring a vertical price-fixing agreement.

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10 Brief for the United States as Amicus Curiae in *Monsanto*, *supra*, at 16; *accord Broadcast Music, Inc.* v. *C.B.S.*, 441 U.S. 1, 19-20 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688, 692 (1978); *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958).

Conclusion

For the foregoing reasons, we ask the Court to grant a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

Dated: November 16, 1984

Respectfully submitted,

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APPENDICES

APPENDIX A

Listing Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States

The Buckingham Corporation Affiliates*

International Genetic Engineering, Inc.
Poultry Foods Industries, Inc.
Rusty Jones, Inc.
Webcraft Technologies, Inc.
Abella E. Hijos
Adam Titz Vert, GMBH & Co Kg
Adam Titz Vertriebs GMBH
Ailiram S.A. Productos Alimentic
Al Rostamani Beatrice Middle East
Althentarios Y Tecnia S.A. De C.
Alimentos Futura S.A.
Altro S.A. De C.V.
Anchor Japan Co. Ltd.
Artigel GMBH
Artigel GMBH & Co. Kg
Australian Freezers Pty. Ltd.
Baron's Table Specialty Meats Pt.
Beans (Hong Kong) Ltd.
Beatrice Disc Inc.
Beatrice Foods (Ontario) Ltd.
Beatrice Foods (S) Pte. Ltd.
Beatrice Foods (U.K.) Ltd.
Beatrice Foods Co. & Dr. Suwelac
Beatrice Foods Finance (Europe)
Beatrice Foods S.D.N. Berhard
Bebidas Savoy C.A.

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* Each of the companies listed in this appendix is a subsidiary of Beatrice Companies, Inc., the parent company of The Buckingham Corporation. Wholly-owned subsidiaries of Beatrice Companies, Inc. are not listed.

Bireley's Calif Orange (Thail)
Boquitas Fiestas S.A. De C.V.
Caramelos Royal S.A.
Charles Candy Co Ltd.
Chocolates S.A. De C.V.
Choky S.A.
City Centre Cold Stores Pty. Ltd.
Comelco N.V.
Comelco S.V. M.S.C.
Consevera Campofrio S.A.
Creme Glacee Cyriel N.V.
Cremo Ltd.
Culligan Flandres
Culligan Italiana S.P.A.
Culligan Lorraine
Culligan Teko A.B.
Culligan Val De Lorie
Dairy Brix Manufacturing Limited
De Forenede Isvaerker A/S Esbjer
Delite Foods Co. Ltd.
Dietetic Products GMBH
Dietetic Products GMBH & Co. Kg
Distribudora Marsanita C.A.
Distributdora Holanda Del Noroes
Ecudal Ecutoriana De Alimentos
Elnagh S.P.A.
Empac S.A.
Empacadora Pepes S.A. De C.V.
Establissements Baud S.A.
Establissements Boizet
Europe Strength Food Co Pty Ltd.
Finance Corporation of Jamaica
Food Producers Europe B.V.
Food Producers Japan Ltd.
Gecoma S.C.S.
Gelati Sanson S.P.A.
Goodwill Bottling Ltd.

Goodwill Bottling North Ltd.
Granos de Oriente, C.A.
Griffiths Laboratories (HK) Ltd.
Guangmei Foods Corp.
H.B. Sohne GMBH & Co Kg
Harman Automotive GMBH
Harman France S.A.
Helados Canarios S.A.
Holanda S.A. De C.V.
Industrias Abella
Industrias Benco C.A.
Industrias Savoy C.A.
Interglas S.A.
Internacional De Alimentacion
Jack's Amazonia-Ind. De Alimento
Jacobi-Scherb, GMBH & Co Kg
K-S-K Tech, Betrieb, GMBH
Kaasmakerij Passendale N.V.
Kasei Fiberite Co. Ltd.
Ksk Tech, Betrieb, GMBH & Co Kg
L.T.M.
Lacsoons N.V.
Nanassen Lucchitti Co Pty Ltd.
Minimarche Essone
Minimarche Hauts De Seine
Minimarche Marne
Minimarche Paris
Minimarche Seine Et Marne
Minimarche Seine St. Denis
Minimarche Val D'Oise
Minimarche Val De Marne
Minimarche Yvelines
Modernas Appl. De La Refr. Indus.
Nergico S.A.
Olischlager N.V.
Pader, Kuh, GMBH & Co Kg
Paderborner Kuh, Beteil, GMBH

Paris Libre Service
Patra Foods (N.Z. Ltd.
Premier Milk (Malaya) Sdn Bhd
Premier Milk (Sing) Pte Ltd.
Productos Alimenticios Rene S.A.
Productos Chipy S.A.
Quimica Stahl Polyvinyl C.A.
Red Tulip Chocolates Pty Ltd.
S.A. Choky
S.A.I.P.A.
Samsonite N.V.
Schwab, Kons, Vert. GMBH
Schwikkard GMBH & Co Kg
Sedipro S.A.
Serco Lubricantes Metalicos S.A.
Smith Kendon Ltd.
Soc Moulin De Chennevieres
Soc. De Gest. De Supermarches
Socadip S.A.
Societe Europeene De Supermarche
Stahl Chemical Asia Pte. Ltd.
Stahl-Asia Trading Pte. Ltd.
Ste. Marie N.V.
Stute Bautrager GMBH & Co Kg
Stute Geschafts, GMBH
Stute GMBH & Co Kg
Stute Kons, GMBH & Co Kg
Stute Konserven GMBH
Stute Nahrung, GMBH & Co Kg
Stute Verwaltungs GMBH
Sunco N.V.
Superette Ile De France
Superette Paris
Superette Seine Et Marne
Superette Seine St. Denis
Superette Yvelines
Tayto Ltd.

Ten Doesschate B. V.
Tendo Haco Farmacie B.V.
Thur. Art. Schindler GMBH & Co
Topland Foods Company (Nigeria)
Tribol S.A.
Unicorp Pty Ltd.
Unigate Pte. Ltd.
Van Camp Chocolates Ltd.
W. J. Dwan & Sons Ltd.
W.L. Ahrens GMGH & Co Kg
Waipat Juices Pty Ltd.
West, Nahrung, Prod. GMBH
Wilh, Kirberg GMBH & Co Kg
Winner Food Products Ltd.
Winston Noodle Products Ltd.
Haifa Chemicals, Ltd.
Incitec, Ltd.
Yong Nam Chemical Company, Ltd.
Swift Independent Corporation
Grupo Industrial PEMSA, S.A. de C.V.
Grupo Industrial PEMSA, S.A. de C.V.
Indel Electrical Supply Corporation
FujiCone, Inc.
Fabricacion y Distribucion de Productos, S. de R.L.
Double-S Poultry Ltd.
Meatpak Hampshire Limited
Avis Car Leasing Limited
Chaconne Pty. Limited
Intercar Tourist Enterprises SA
International Car Rental B.V.
Kenya Rent A Car Ltd.
Locadif S.A.
Olympic Commercial & Tourist Enterprises, SA
Olympic-Crete Commercial & Tourist Enterprises
Manessi Bros.-Olympic Commercial & Tourist Enterprises Ltd.
Sovial Sociedade de Viaturas de Alugar Lda.

Sogen-Avis
Tourism Promotion Services (Kenya) Ltd.
West Indies Car Rental Limited
Algo, S.A. de C.V.
National Car Rentals (Private) Limited
Sistem Sewa Kereta Malaysia Sdn. Bhd.
Mutual Rental Cars (Fiji) Limited
Mutual Rental Holdings, Limited
Norton Simon Canada, Inc.
American Cosmetics Kabushiki Kaisha
Norton Simon Canada, Inc.
Riviera S.R.L.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-6046, 82-5241

BUCKINGHAM CORPORATION, a Delaware Corporation,

Plaintiff,

—v.—

ODOM CORPORATION, a Delaware Corporation, dba ARIZONA DISTRIBUTING COMPANY,

Defendant,

ODOM CORPORATION, dba Arizona Distributing Company,

Counterclaimant-Appellant,

—v.—

BUCKINGHAM CORPORATION; MAZEL CORPORATION, an Arizona Corporation; COPPER STATE DISTRIBUTORS, INC., an Arizona Corporation,

Counterdefendants-Appellees.

Before:

POOLE and BOOCHEVER, *Circuit Judges*, and MCNICHOLS,* *District Judge.*

ORDER

The initial memorandum disposition in this case is reinstated. We applied the same test as required by *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S. Ct. 1464 (1984), namely, that there be sufficient evidence to overcome a

* Honorable Ray McNichols, Senior United States District Judge for the District of Idaho, sitting by designation.

motion for a directed verdict on the question of whether there was a common scheme (an agreement between Buckingham and Copper State) designed to achieve price control, and that Odom was terminated as a result. "[T]here must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor." *Id.* at 1471. The district court should apply the specific standard announced in *Monsanto* when instructing the jury on the standard of proof.

POOLE, *Circuit Judge*:

I respectfully dissent.

Reconsidering this case in light of *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464 (1984), appellant's evidence falls short of the standards announced by the Supreme Court.

Though given an opportunity at trial to present all its available evidence before appellee's motion for directed verdict, appellant has failed to show the "concerted action" required under *Monsanto*. The Supreme Court in that case was quite clear that the concerted action necessary to establish an antitrust violation should not be lightly assumed to exist. Price fixing agreements, the Court warned, should not be inferred from "highly ambiguous evidence." 104 S.Ct. at 1470.

In our prior disposition, we recognized that Buckingham had shown legitimate, independent business reasons for terminating Odom. As a competitor, Copper State, too, had obvious reasons to wish for Odom's termination. The evidence presented is perfectly consistent with the view that Buckingham and Copper State were each acting on their own. But under the standards announced in *Monsanto*, Odom's termination cannot support antitrust liability unless there is "evidence that *tends to exclude the possibility* that the manufacturer and non-terminated distributors were acting independently." 104 S.Ct. at 1471.

Here, there is no such evidence. The Ahlburg Memorandum, on which appellant chiefly relies, is not so sinister as appellant pretends. Even read in the light most favorable to the terminated distributor, this document does not show a price fixing agreement between Buckingham and Copper State. Ahlburg's casual reference to communications with Copper State employees will not support a finding that Odom's subsequent termination was the result of an agreement with the competing distributor. As the Court in *Monsanto* recognized, "[a] manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market." 104 S.Ct. 1470. Moreover, it noted, "complaints about price-cutters 'are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals.' " *Id.* This communication between Ahlburg and Copper State does not make out a showing of concerted activity.

The professed willingness of Copper State's president to make a "commitment" to the Cutty Sark brand and to "work" to promote it, is equally innocuous. In the exercise of its own business judgment, Buckingham was entitled to choose the wholesaler whom it believed would best promote its brands, and the antitrust laws do not prohibit that choice. Nothing in the reported conversations between Ahlberg and Copper State indicates an agreement to fix prices or otherwise shows a "conscious commitment to a common scheme to achieve an unlawful objective." 104 S.Ct. at 1473.

At best, appellant's evidence is "highly ambiguous," amounting to a temporal coincidence between its own termination and complaints from a competing distributor. Though before *Monsanto* such evidence may have been thought sufficient to withstand a directed verdict, I believe the Supreme Court's recent decision requires more. Consequently, I would affirm the district court.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-6046, 82-5241

D.C. No. CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION,
a Delaware corporation,

Plaintiff,

—v.—

THE ODOM CORPORATION, a Delaware corporation,
dba ARIZONA DISTRIBUTING COMPANY,

Defendant,

THE ODOM CORPORATION,
dba ARIZONA DISTRIBUTING COMPANY,

Counterclaimant/Appellant,

—v.—

THE BUCKINGHAM CORPORATION; MAZEL CORPORATION,
an Arizona corporation; COPPER STATE DISTRIBUTORS,
INC., an Arizona corporation,

Counterdefendants/Appellees.

MEMORANDUM

Argued and Submitted—October 15, 1982
Decided—February 25, 1983

Appeal from the United States District Court
for the District of Arizona
Honorable Charles L. Hardy, District Judge, Presiding

Before: POOLE and BOOCHEVER, *Circuit Judges,*
and MCNICHOLS,* *Senior District Judge.*

Buckingham sued Odom for a declaratory judgment that its termination of Odom as a liquor distributor was lawful under the Sherman Act. The district court granted a directed verdict for Buckingham but denied it attorney's fees for defending various state law claims brought by Odom. Both sides appeal.

Although Odom's evidence was weak, there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict. Arizona law may provide for attorney's fees in cases such as this. We therefore reverse and remand.

In this case, the standard of review is critical. In considering a motion for directed verdict, the controlling inquiry is whether, viewing the evidence as a whole, there is substantial evidence present that could support a finding, by reasonable jurors, for the nonmoving party (i.e., Odom). *United California Bank v. THC Financial Corp.*, 557 F.2d 1351, 1356 (9th Cir. 1977). The evidence is viewed in the light most favorable to the nonmoving party. *Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034, 1036 (9th Cir. 1975).

Buckingham presented evidence that it terminated ADC in its independent discretion and for legitimate business reasons unrelated to price. This evidence included Buckingham's desire to upgrade the Cutty Sark image, its desire for an eager distributor to whom Buckingham's brands would be important, the results of the wine contest, the comparison of growth in Cutty Sark sales prior to the April discount, the "Ceccarelli" testimony, and the Finlandia discount.

Viewing the evidence in the light most favorable to Odom, however, we find that there was sufficient evidence to support a jury verdict in its favor by reasonable persons. Particularly persuasive are the "Ahlburg Memorandum" which focused on the pricing reasons for the termination, and Gellerman's offer to make a "commitment" in exchange for an exclusive distrib-

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* Honorable Ray McNichols, Senior United States District Judge for the District of Idaho, sitting by designation.

utorship. While Gellerman might have only meant a commitment to sell the product aggressively, a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price. We therefore conclude that the district court erred in granting a directed verdict.

Odom brought a counterclaim based on the Arizona Spirituous Liquor Franchises Act, Ariz. Rev. Stat. Ann. §§ 44-1565-44-1567 (West Supp. 1982), which it later abandoned. Section 44-1567 makes an award of attorney's fees to the "prevailing party" mandatory. Thus, if Buckingham prevailed, it was error for the district court not to award attorney's fees on the Franchise Act claim. But it is not clear whether to be a "prevailing party" under Arizona law it is enough that the party prevailed on the Franchise Act claim alone, rather than in the case as a whole. The district court should initially decide this issue of Arizona law. Since it is necessary to remand for a new trial, determination of whether to make an award of attorney's fees and, if one is made, the reasonable amount, must await the outcome.

Odom also brought a counterclaim based on a theory of implied contract. Ariz. Rev. Stat. Ann. § 12-341.01(A) (West 1982) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees." Buckingham was granted a directed verdict on the implied contract action.

Section 12-341.01 has a stated purpose of "mitigat[ing] the burden of the expense of litigation to establish a just claim or a just defense." Ariz. Rev. Stat. Ann. § 12-341.01(B); *Shirley v. Hartford Accident & Indemnity Co.*, 125 Ariz. 70, 607 P.2d 389, 390 (Ct. App. 1979). Therefore, in the light of the remedial nature of the statute, *Nationwide Mutual Insurance Co. v. Granillo*, 117 Ariz. 389, 573 P.2d 80, 86 (Ct. App. 1977), the court may have abused its discretion in not granting attorney's fees.

Again, it is not clear whether to be "successful" Buckingham must succeed in the case as a whole or if it is enough to succeed on the implied contract claim alone. At the conclusion of the trial, the district court should determine this issue.

Section 12-341.01(B) expressly states that reasonable attorney's fees need not equal or relate to actual attorney's fees. Therefore, if the district court awards attorney's fees on the implied contract claim, it must determine what amount would be reasonable.

REVERSED and REMANDED.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION,
a Delaware corporation,

Plaintiff,

—v.—

THE ODOM CORPORATION, a Delaware corporation,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Defendant.

Before: THE HONORABLE CHARLES L. HARDY
Judge of the United States District Court

APPEARANCES:

For the Plaintiff:
Mr. Jay Greenfield
Mr. Richard D. Friedman
Attorneys at Law

For the Defendant:
Mr. Daniel S. Mason
Mr. Craig Corbitt
Attorneys at Law

For Mazel Corp. and
Copper State Distributing
Mr. Daniel J. McAuliffe
Attorney at Law

November 24, 1981
Phoenix, Arizona
A. M. Session

[807]*

IN OPEN COURT (NO JURY PRESENT)

PROCEEDINGS

THE COURT: Yesterday I had my secretary call you and tell you that I was proposing to deny the motion on the counter-defendants, Buckingham and Copper State, on the antitrust claims, grant it on the implied contract claim. I really have now concluded I ought to direct a verdict on the antitrust claims.

I'd like to try to articulate my reasons. We start out with the proposition that everybody agrees here that there should only be one Cutty Sark distributor in Arizona. And the evidence seems to be undisputed when the new management took over Buckingham in late 1980 they became cognizant of the desirability of having one distributor but decided because they did not know either ADC or Copper State to wait and observe how these two companies operated.

I believe Mr. Alburg testified that even before April he was beginning to lean towards Copper State. And then in April we have the—I use the term "famous discount" by ADC, which it can be said, I think, that Mr. Gellerman complained to both Mr. Lichtenberger—well, initially to Mr. Lichtenberger then later talked to Mr. Alburg about it. While it's disputed, said, "What are you going to do about it?"

[808]

Mr. Alburg told him that he would propose to recommend that Copper State become the exclusive distributor. That was on the 28th of April. And on the 29th, after Mr. Alburg had returned to his office in Los Angeles, he talked to Mr. Karp in New York. He told him of his conversations with Mr. Braddock and Mr. Gellerman, and then wrote the memorandum, which is Exhibit 101, in which he recommended that Copper State handle the complete line on an exclusive basis.

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* Bracketed numbers refer to pages in the Reporter's Transcript of Proceedings.

I need to back up a little. On the 28th when Mr. Alburg was in Phoenix he told Mr. Braddock that Buckingham disapproved of these so-called deep discounts. And again there is a dispute in the testimony. He told him that Buckingham would like to have a voice in the programming of the sales of Cutty Sark.

There was apparently some evidence the word "program" was not used, but the discounts, or the prices, I'm not quite sure.

In any event, whatever was said, I can't find that what Mr. Alburg said to Mr. Braddock was coercive. And then, frankly, I can't find anything in the evidence from which to support a finding that Mr. Gellerman agreed that if he had the exclusive he would follow Buckingham's suggestions as to prices to be placed on the Buckingham products.

Then, what is really compelling to me, is this: If we could find an understanding between Alburg and Gellerman that [809] if he would get the exclusive distributorship then Gellerman would agree to follow Buckingham's price suggestions, if we could find that kind of an agreement—I can't see how that is an agreement of Buckingham's, because Alburg has no authority to make that agreement, the decision as to who is to be the exclusive distributor is Mr. Karp's decision, and I just don't see how he made a decision—how his decision in August was the product of any agreement on his part to give the exclusive distributorship to Gellerman, or to Copper State if Copper State would maintain its prices in accordance with Buckingham's suggestions.

Furthermore, there are a lot of cases which say that a supplier can always terminate his distributor provided that the reason, whether it's the sole reason or overriding reason or substantial reason, is not an anti-competitive one. But I suspect that in many of those cases they are cases where the suppliers are in a truly competitive market; for example, a Texaco station which for one reason or another starts undercutting, you know, selling at a lower price than all the other Texaco dealers in town, and is terminated for that reason. But here everybody agrees that there should only be one distribu-

tor. And, really, Buckingham is in a Catch 22 situation. If they give it to ADC then Copper State complains that it's done because they were lower. And, by the way, we've got the same conversations, the same—well, not the complaints, but we've [810] got the urging from Mr. Braddock in behalf of ADC to Buckingham that Arizona is just not big enough for two, it can't get proper attention.

So, as I say, Buckingham is in a no-win situation in this case, and where everybody agrees that there should only be one distributor, and Buckingham decides to give it to Copper State, how—really, how can it be an anti-competitive decision, a decision to eliminate competition? How can it be a restraint of trade?

* * *

[888]

THE COURT: I'm going to grant the motion. I have come to the conclusion there is no evidence to show these parties acted in concert, and I'm going to grant the motion.

* * *

(Whereupon the jury is returned to the courtroom.)

THE COURT: Ladies and gentlemen, I've granted a motion for directed verdict which means that I have ruled that there is nothing to go to the jury in the case. That puts you out of a job.

In this case ADC had to show that Copper State and Buckingham acted together, what the law calls acting in concert to restrain trade, but I can't find any evidence to support that kind of conclusion. On that basis I have granted a motion for directed verdict.

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION, a Delaware corporation,

Plaintiff,

—vs.—

THE ODOM CORPORATION, a Delaware corporation, d/b/a ARIZONA DISTRIBUTING COMPANY,

Defendant.

THE ODOM CORPORATION, a Delaware corporation, d/b/a ARIZONA DISTRIBUTING COMPANY,

Counterclaimant,

—vs.—

THE BUCKINGHAM CORPORATION, a Delaware corporation; MAZEL CORPORATION, an Arizona corporation; and COPPER STATE DISTRIBUTORS, INC., an Arizona corporation,

Counterdefendants.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Charles L. Hardy, United States District Judge, presiding, and the issues having been duly tried, and the Court having directed the verdict, and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the Motion for Directed Verdict of Plaintiff-Counterdefendant, The Buck-

ingham Corporation, and Counterdefendant Mazel Corporation, doing business as Copper State Distributors, Inc., is granted and that they take nothing by their counterclaim.

IT IS FURTHER ORDERED that Plaintiff-Counterdefendant have declaratory judgment against Defendant-Counterclaimant declaring that its termination of Defendant-Counterclaimant's franchise was not in violation of Arizona law.

Dated at Phoenix, Arizona this 10th day of December, 1981.

W.J. FURSTENAU, CLERK

By /S/ (Signature Illegible)
Deputy Clerk

Appendix F

(Letterhead of Arizona Distributing Company)

March 19, 1980

Mr. Robert Fine
The Buckingham Corporation
11777 San Vincente Blvd.
Suite 620
Los Angeles, CA. 90049

Dear Bob:

With the possible sale of Copperstate in the near future, it brings back to my mind our past conversation about dual items in the Arizona market. I have always felt that the dual items suffer from a lack of salesmen's interest. There are only a handful of dual items in this market and the salesman always has an exclusive item to push in place of any brand which also may be handled by a competitor.

If you would consider moving your entire line back to the Arizona Distributing Company I would personally assure you substantial increases in volume.

All the wines would be put on the "Arizona side" of the sales force and be handled by our chain division. I am confident that we could increase Mouton Cadet sales by 30 to 40 percent, the first year.

I am also sure that Cutty Sark sales could be increased by 10 to 15%, if we were the exclusive distributor.

Bob, our state is not a healthy environment for dual merchandise and I am sure your sales figures would be impressive if you made the move to Arizona Distributing.

Many thanks for your consideration.

Sincerely

JACK

J.T. Braddock
President

jtb/les

Appendix G

MEMORANDUM

PERSONAL & CONFIDENTIAL

Date: April 29, 1981

Steve Karp
From: Ken Ahlburg

ARIZONA

The state of Arizona is too small for two wholesalers selling our line. Forgetting all the standard cliches, shelf management is non-existent and uniform marketing that gets results cannot be coordinated with a dual.

This month, Arizona Distributors had a 5 case discount of $15.00 off on Cutty Sark (see attached), coupled with April being a buy-in, makes no sense. Plus, 5 case discounts do not get floors, 50 and 100 case discounts get the action. We sold a lot of goods in but the action to the consumer is not there.

I spoke with Jack Braddock regarding this, and his reason was that he felt that Copper State was always beating his deal by a dollar. By doing this, he would "show Copperstate".

In my opinion, "Showing Copper State" can and will be very detrimental to our over-all long term marketing of Cutty Sark.

I also spoke to Bernie Gellerman and he swears he has not been doing any such pricing.

I am recommending we have Copper State handle our complete line on an exclusive basis.

Regards,

KEN

KA:hb

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No CIV 81-1028 PHX CLH

THE BUCKINGHAM CORPORATION,
a Delaware corporation,

Plaintiff,

—v.—

THE ODOM CORPORATION, a Delaware corporation,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Defendant.

Before: THE HONORABLE CHARLES L. HARDY
Judge of the United States District Court

APPEARANCES:

For the Plaintiff:
Mr. Jay Greenfield
Mr. Richard D. Friedman
Attorneys at Law

For the Defendant:
Mr. Daniel S. Mason
Mr. Craig Corbitt
Attorneys at Law

For Mazel Corp. and
Copper State Distributing
Mr. Daniel J. McAuliffe
Attorney at Law

November 20, 1981
Phoenix, Arizona
A. M. Session

Testimony of Ken Ahlburg

[712]*

* * *

Q. How would you describe Mr. Gellerman's manner?

A. Well, his—

MR. MASON: Your Honor, I think we have all seen Mr. Gellerman's manner. I would object to that question.

THE COURT: Overruled.

[713]

MR. FRIEDMAN: Thank you, Your Honor.

A. Mr. Gellerman one-on-one, particularly that evening, was an excellent sales person. I mean he showed a great deal—a great deal of emotion. I mean it was like, "I need this line, here's what I can do, I will make this kind of commitment, whatever it takes to build this brand I'm here to do it. I'll work." You know, just everything. And he discussed, you know, the fact that—he discussed what I mentioned earlier about the share of mind. He discussed the fact that he was using his computer network so he can monitor accounts in a more orderly fashion, we could get the information that we are not getting right now like accounts sold, and over—and the accounts what they sold last year versus this year. All of this information is really important when a salesman goes out to sell an account. A salesman walks in to an account, and if he knows last year during the holiday season he sold them say 100 cases and one ad, if a salesman has anything about him he's going to say, "You had one ad, you had 100 cases, why don't you put in two ads and let me sell you up to 200 cases." That's the purpose.

Q. You said Mr. Gellerman—

A. That's exactly what he was doing. I mean the buy was as emotional as I am right now. I'm sorry.

Q. Did you believe him?

A. What do you think? Yes, sir.

Q. Did Mr. Gellerman make any promises at that meeting

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* Bracketed numbers refer to pages in the Reporter's Transcript of Proceedings

[714]

concerning his pricing of Cutty Sark?

A. No.

Q. Concerning his discounting of Cutty Sark?

A. No.

Q. Did you ask him for any commitments concerning pricing?

A. No.

Q. Concerning discounting?

A. No.

Appendix I

SUPREME COURT OF THE UNITED STATES

No. 82-1787

BUCKINGHAM CORPORATION,

Petitioner,

—v.—

ODOM CORPORATION, dba Arizona Distributing Company

Respondent.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Monsanto Company* v. *Spray-Rite Service Corporation*, 465 U.S. ____ (1984).

IT IS FURTHER ORDERED that the petitioner, Buckingham Corporation, recover from Odom Corporation, dba Arizona Distributing Company Two Hundred Dollars ($200.00) for its costs herein expended.

April 2, 1984

Clerk's costs: $200.00

Supreme Court, U.S.
FILED
DEC 22 1984
ALEXANDER L. STEVAS
CLERK

No. 84-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BUCKINGHAM CORPORATION
Petitioner,

v.

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Did the Court of Appeals err in holding that there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict?

PARTIES TO THE PROCEEDINGS

The Arizona Distributing Company division of The Odom Corporation was sold to Foremost-McKesson Inc. on March 8, 1983. The entity is now known as McKesson Wine & Spirits dba Arizona Distributing Company. The Odom Corporation retained all causes of action relating to this case.

The subsidiaries of The Odom Corporation are: Campco, Alaska, Inc.; Campco Pacific, Inc.; Clearwater Beverage, Inc.; Famous Brands, Inc.; and S & D Investments, Inc.

Petitioner's parent and affiliates are listed in the Petition. In addition to petitioner and respondent, the parties in the court below included Copper State Distibutors, Inc. and Mazel Corporation. These parties also have an interest in the outcome of the appeal. Upon information and belief, the parents and affiliates of Mazel Corporation and Copper State Distibutors include: Peerless Importers, Inc.; Johnny Barton, Inc.; All American Distributing Co., Inc.; and Klick Distributing Co.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	i
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	2
I. Respondent's Termination	2
II. Proceedings Below	6
REASONS FOR DENYING THE WRIT	8
I. The Decision Of The Court Of Appeals Is Fully Consistent With *Monsanto*	9
II. This Is An Inappropriate Case For The Court To Reconsider The *Per Se* Rule. Such Reconsideration In Any Event Would Be Unwarranted	15
III. The Court Should Deny Review Because The Court Of Appeals' Decision Is Interlocutory	16
CONCLUSION	17
APPENDIX A (Text of Ahlburg Memorandum with attached "Deal Sheet" (Exh. 101))	A-1
APPENDIX B (Order Denying Rehearing And Suggestion for Rehearing En Banc (Sept 28, 1984))	B-1

TABLE OF AUTHORITIES

CASES	PAGE(S)
Adickes v. *S. H. Kress & Co.*, 398 U.S. 144 (1970)	15
American Tobacco Co. v. *United States.* 328 U.S. 781 (1946)	9, 11
Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & A.R. Co.*, 389 U.S. 327 (1967)	16
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)	2
Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977)	12, 15
Cullinan v. *Burlington Northern, Inc.*, 522 F.2d 1034 (9th Cir. 1975)	2
Delta Air Lines, Inc. v. *August*, 450 U.S. 346 (1981)	15
Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911)	15
Esco Corp. v. *United States*, 340 F.2d 1000 (9th Cir. 1965)	11
Girardi v. *Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963)	11
Hamilton-Brown Shoe Co. v. *Wolf Bros & Co.*, 240 U.S. 251 (1916)	16
H. L. Moore Drug Exchange v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982)	13
Jeanery, Inc. v. *James Jeans, Inc.*, 1984-2 Trade Cas. (CCH) ¶66,278 (D.Ore. 1984)	14
Malley-Duff & Assoc. v. *Crown Life Ins. Co.* 734 F.2d 133 (3d Cir.) cert. denied, 53 U.S.L.W. 3417 (Dec. 4, 1984)	14
Monsanto Co. v. *Spray-Rite Service Corp.*, ___U.S.___, 104 S.Ct 1464 (1984)	1, 7, 8, 9, 10, 11, 13, 14, 15
Neil v. *Biggers*, 409 U.S. 188 (1972)	14
Norfolk Monument Co. v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969) (per curiam)	9
Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968)	13
Roesch, Inc. v. *Star Cooler Corp.*, 671 F.2d 1168 (8th Cir. 1982), aff'd by equally divided court, 712 F.2d 1235 (8th Cir. 1983) (en banc), *cert denied*, ___U.S.___, 104 S.Ct. 1707 (1984)	14

CASES — PAGE(S)

Spray-Rite Service Corp. v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *aff'd*, __U.S.__, 104 S.Ct. 1464 (1984) ... 11

Uniroyal, Inc. v. *Jetco Auto Service, Inc.*, 461 F.Supp. 350 (S.D.N.Y. 1978) ... 13

United States v. *General Motors Corp.*, 384 U.S. (1966) ... 9

United States v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) ... 13

White Motor Co. v. *United States*, 372 U.S. 253 (1963) ... 13

STATUTES

Sherman Act, Section 1 (15 U.S.C. §1) ... 6

Public Law 98-166, 97 Stat. 1071 (1983) ... 16

No. 84-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BUCKINGHAM CORPORATION,
Petitioner,

v.

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

This Court is asked by petitioner to grant *certiorari* in this case because the Court of Appeals for the Ninth Circuit allegedly failed to follow the holding of *Monsanto Company v. Spray-Rite Service Corporation,* 104 S.Ct. 1464 (1984). However, the Court of Appeals explicitly based its decision on *Monsanto,* and directed the district court to apply *Monsanto* when instructing the jury at the retrial. Petitioner is really asking this Court to review the evidence, under the same legal standard which was applied by the Court of Appeals, and substitute its judgment for that of the Court of Appeals.[1]

[1] The following abbreviations are used in this brief: "Tr." (trial transcript); "Exh." (trial exhibit); "CR" (district court docket number); "Pet." (Buckingham's Petition for Certiorari); "Pet.App." (Appendix to Petition); "Resp.App." (Appendix to this brief).

COUNTERSTATEMENT OF THE CASE

In its Statement Of The Case, petitioner selectively recasts the evidence, compartmentalizes it, and then draws every possible inference in its favor. This is contrary to the rule that the evidence must be considered as a whole, in the light most favorable to respondent, to determine whether reasonable jurors could have found in respondent's favor.[2]

I.

Respondent's Termination.

Through its former subsidiary, Arizona Distributing Company ("ADC"), respondent introduced Cutty Sark scotch whiskey to the state of Arizona, and distributed it continuously until its distributorship was terminated in 1981. Tr. 196-97. During that time, relying on Buckingham's representation of a "partnership," ADC expended over $800,000 for local advertising of the product, notwithstanding Buckingham's total control over such expenditures; as a result, Cutty Sark was unprofitable to ADC. Tr. 198-201, 236, 257, 283. Nevertheless, Cutty Sark was a "necessary evil," because, as one of the "big four" premium scotches (Pet., p. 5; Tr. 81), it was a "door opener" for the remainder of respondent's products. Tr. 201-02. Until 1981, the business relationship between petitioner and respondent was "outstanding." Tr. 406-07, 412-13; Exh. 12. Respondent played a large role in helping to build Cutty Sark into one of the leading brands of scotch whiskey in the country. Tr. 199.

When new management assumed control in late 1980, Buckingham underwent a major change in its pricing philosophy. Richard Newman, Buckingham's new president, insisted that Cutty Sark pricing be "firmed up" to be "in line" with the other premium scotches: J & B, Johnny Walker Red, and Dewar's. Pricing of Cutty Sark had been "bastardized," according to Newman, because "wholesalers were competing against each other." Tr. 409-10, 417. Buckingham's objective

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[2] Pet.App. C, p. 11a; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Cullinan* v. *Burlington Northern, Inc.*, 522 F.2d 1034, 1036 (9th Cir. 1975).

was to establish Cutty Sark retail prices in a "parity relationship" with the rest of the "big four." Tr. 675. Nevertheless, although Buckingham "suggested" and discussed resale prices, it ostensibly recognized its obligation not to dictate such prices or to become involved in pricing disputes between its distributors. Tr. 121, 437-38, 458-59, 625.[3]

In late April 1981, ADC ran a special 10-day discount on Cutty Sark (Tr. 207-10; Resp.App. A; Exh. 101) which Buckingham regarded as "excessive." Tr. 449. Although Buckingham later claimed that its real objection was that this discount was done "without a plan" (Tr. 1[illegible]8-19, 450), in fact, the discount was part of a carefully coordinated effort which successfully stimulated sales. Tr. 207-15, 294, 345-46, 367-71.

Immediately upon learning of ADC's discount, Bernard Gellerman, the president of Copper State (ADC's competitor), telephoned Kenneth Ahlburg, petitioner's Vice President and Western Division Manager, whose office was in Los Angeles. Gellerman was "upset"; he called the discount "ridiculous," and assured Ahlburg that he was "not going to compete with that price." Tr. 585-86, 631-32. Instead of ignoring these complaints, as company policy required, Ahlburg demanded to know "what the hell [was] going on in Arizona" (Tr. 585), and promised Gellerman that "we'll find out what's going on." Tr. 633-34, 705. Ahlburg instructed Terry Lichtenberger, the regional sales manager, to investigate and confront Jack Braddock, ADC's president. Tr. 634, 705.

Soon thereafter, Gellerman again complained, this time to Lichtenberger, that respondent was "screwing up the market." Tr. 455-56. Gellerman, upset because he was no longer "controlling the market," demanded that Buckingham "do

---

[3] Petitioner incorrectly claims that "[t]here was no evidence that Buckingham in any way suggested the actual price charged by ADC or Copper State for Buckingham's brands." Pet., p. 5. Besides the inferences to be drawn from Buckingham's conduct following ADC's April 1981 discount (discussed below), there was direct testimony that Buckingham suggested discounts:

"Q. . . . Is it your practice to always suggest discounts off of list price?

"A. We do that when we have an increase in price to the distributor. I think we heard testimony before that we like to be in a particular category." (Tr. 433 (Lichtenberger).)

something about it." Tr. 455-57, 464. Once again, instead of ignoring this protest, Lichtenberger promised to see Braddock. Tr. 461-62.

Lichtenberger relayed Gellerman's complaints to Braddock, who explained that since Copper State, through lower pricing, had outsold ADC in recent months, the discount had been initiated to stimulate sales, encourage ADC's sales force, and "to show the competition [*i.e.*, Copper State] that we were still in the business of selling Cutty Sark." Tr. 217-19, 462-63. Lichtenberger reported back to Ahlburg, who responded that he did not "appreciate this type of thing happening." Tr. 471, 475, 478.

Ahlburg next telephoned his superior, Stephen Karp, petitioner's Senior Vice President, in New York. Once more, instead of instructing Ahlburg to ignore this pricing dispute between petitioner's distributors, Karp directed Ahlburg to go to Phoenix to investigate. Tr. 109, 635. Ahlburg went to Phoenix and confronted Braddock, who repeated the explanation he had given Lichtenberger. Tr. 221-22, 640-41. Ahlburg warned Braddock that such discounting was "definitely against" petitioner's new philosophy, and that Buckingham wanted, "in the future, [to] have a say in the programming of the brand," *i.e.*, "to outline [respondent's] discounts." Tr. 221-22 645.[4]

Later that same day, Ahlburg met Gellerman. Ahlburg repeated portions of his conversation with Braddock. Gellerman assured Ahlburg of his belief that discounts were a "stupid move." Tr. 592-93, 596-97. When told of Braddock's statement that Copper State had priced below respondent from time to time, Gellerman replied: "I swear I've never done that" or "I swear I've not been doing any such pricing." Tr. 589, 591-93, 712; Exh. 101. Gellerman then asked for the line on an exclusive basis, *i.e.*, for the termination of respondent, and promised: "I will make this kind of commitment, whatever it takes to build this brand I'm here to do it." Tr. 712-13.

[4] "Programming" means pricing and discounting of a product, as well as other aspects of marketing. Tr. 233, 361.

Ahlburg promised Gellerman that he would recommend respondent's termination. Tr. 519, 592, 713.[5]

The next day, Ahlburg returned to Los Angeles and telephoned his report and recommendation to Karp. Karp told Alhburg to put things "down on paper." Tr. 110, 647-50, 714-15. Ahlburg did so in the form of a memorandum to Karp (the "Ahlburg Memorandum"), dated April 29, 1981, to which he attached a copy of respondent's "deal sheet" listing the April discounts. Tr. 653-55; Exh. 101, Resp.App. A.[6] This document—the only document in the case which discussed the reasons for the termination (Tr. 660-61)—repeated Ahlburg's unhappiness with respondent's discounting, reported Gellerman's "swearing" that he had not done the same, and concluded by recommending the termination of ADC. Exh. 101, Resp.App. A.

Before this time, Karp had been "non-committal" about the situation in Arizona. Tr. 107. In late April, he received the Ahlburg Memorandum (Tr. 109), and sometime thereafter recommended to Newman that ADC be terminated. Newman relied totally on Karp's oral recommendation, and devoted about five minutes to the decision. Tr. 667-71. By June or early July 1981, Karp told Ahlburg that Buckingham was "going to go" with the termination. Tr. 662. ADC was notified on August 17, 1981. Tr. 296; Exh. 103.[7]

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[5] Gellerman's testimony flatly contradicted Ahlburg's and Lichtenberger's in a number of important respects. For example, Gellerman first admitted, then denied, that he had discussed pricing or discounting at all, denied that Ahlburg had said anything about meeting Braddock, and "did not recall" his complaining statements to Lichtenberger. Tr. 509-11, 513, 585-18, 569, 582-83. Gellerman even denied that he had complained to Ahlburg at all about respondent's discounts, asserting: "[I]f I would have said anything to him about the discounts I know his words would have been, 'Hey, if you can't stand the heat get out of the kitchen.' I wouldn't have said anything." Tr. 568.

[6] Although petitioner reproduced the Ahlburg Memorandum in its appendix (Pet.App. G, p. 22a), it failed to include the "deal sheet," which was also a part of Exhibit 101. Respondent has reproduced the entire exhibit as its Appendix A to this brief.

[7] Petitioner insisted that pricing was "irrelevant" to the decision to terminate (Tr. 651), and continues to advance other reasons. Pet., p. 4. Respondent presented evidence from which the jury could have rejected all of these reasons:

(Footnotes continued on following page)

II.

Proceedings Below.

Although it portrays itself as having been dragged into litigation as the helpless victim of circumstances, in fact it was petitioner which initiated this case and was the plaintiff in the district court. On August 25, 1981, only one week after respondent was notified of its termination, petitioner filed an action for declaratory judgment. CR 1. Respondent answered and counterclaimed on September 16, 1981, adding Copper State and its parent Mazel Corporation as counterdefendants, and alleging, *inter alia*, that it was terminated pursuant to unlawful concerted action to eliminate price competition, in violation of the Sherman Act, 15 U.S.C. §1. CR 19. Following an expedited discovery schedule, a jury trial commenced on November 17, 1981. Petitioner and Copper State moved for a directed verdict following three days of testimony. The district court changed its mind three times before finally granting the motion (Tr. 807, 873, 888), on the ground that there was "no evidence to show that [counterdefendants] acted in concert." Tr. 888, Pet.App. D, p. 17a. Judgment was entered on December 10, 1981. Pet.App. E.

(Footnotes continued from preceding page)

First, Copper State's "victory" in the "wine contest" was due to greater inventory; ADC abandoned the contest after one month when advised by Lichtenberger that it could not catch up without paying a surcharge over the usual price to obtain more wine. Tr. 229-31, 286-87, 324-27. Moreover, Buckingham's president testified that the results of the wine contest were irrelevant to a distributor's ability to sell Cutty Sark. Tr. 692.

Second, contrary to petitioner's assertion (Pet., p. 4), the record did *not* show that "Copper State's comparative sales performance figures were consistently higher than ADC's." Respondent's total sales were higher through 1981 until its termination, and had increased by a greater margin during the preceding year. Tr. 207-08, 570-71, 680; Exh. 50.

Third, Braddock explained that his "necessary evil" comment reflected no lack of commitment; indeed, respondent had sold the product for 25 years on an unprofitable basis precisely because it has such a commitment. Tr. 198-202.

Fourth, in view of Gellerman's denials on the stand of statements made by *petitioner's* witnesses (*see* note 5, *supra*), and his trial demeanor (which of course cannot be observed on appeal), the jury could have concluded that he perjured himself, and rejected not only his testimony but petitioner's claim that he "had persistently displayed his commitment." Pet., p. 4.

In an unpublished memorandum filed February 25, 1983, the Court of Appeals reversed, holding that "there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict." Pet.App. C, p. 11a. Contrary to petitioner's surmise that the Court of Appeals considered only two items of evidence and ignored other critical evidence, it is clear from the Court of Appeals' memorandum that petitioner's evidence was considered fully:

> "Buckingham presented evidence that it terminated ADC in its independent discretion and for legitimate business reasons unrelated to price. This evidence included Buckingham's desire to upgrade the Cutty Sark image, its desire for an eager distributor to whom Buckingham's brands would be important, the results of the wine contest, the comparison of growth in Cutty Sark sales prior to the April discount, the 'Ceccarelli' testimony, and the Finlandia discount.
>
> "Viewing the evidence in the light most favorable to Odom, however, we find that there was sufficient evidence to support a jury verdict in its favor by reasonable persons. Particularly persuasive are the 'Ahlburg Memorandum' which focused on the pricing reasons for the termination, and Gellerman's offer to make a 'commitment' in exchange for an exclusive distributorship. While Gellerman might have only meant a commitment to sell the product aggressively, a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price. We therefore conclude that the district court erred in granting a direct verdict." (Pet.App. C, pp. 11a-12a.)

On April 2, 1984, this Court vacated the Court of Appeals' February 25, 1983 decision, and remanded for reconsideration in light of *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984). Pet.App. I. The Court of Appeals ordered the parties to submit additional briefs concerning the impact of *Monsanto* on its prior ruling. On August 7, 1984, in another unreported decision, the Court of Appeals held that *Monsanto* dictated the same result it had previously reached, *i.e.*, that sufficient evidence of conspiracy had been presented to allow reasonable jurors to rule in respondent's favor:

> "The initial memorandum disposition in this case is reinstated. We applied the same test as required by *Monsanto Co. v. Spray-Rite Service Corp.*, __U.S.__, 104 S.Ct. 1464 (1984), namely, that there be sufficient evidence to overcome a motion for a directed verdict on the question of whether there was a common scheme (an agreement between Buckingham and Copper State) designed to achieve price control, and that Odom was terminated as a result. '[T]here must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor.' *Id* at 1471. The district court should apply the specific standard announced in *Monsanto* when instructing the jury on the standard of proof." (Pet.App. B, pp. 7a-8a.)

On September 28, 1984, the panel voted unanimously to deny Buckingham's petition for a rehearing. No judge of the full court requested a vote on Buckingham's suggestion of a rehearing *en banc*. Resp.App. B.

REASONS FOR DENYING THE WRIT

Petitioner's make-weight arguments notwithstanding, the only issue here is whether the Court of Appeals complied with this Court's directive to consider whether the evidence meets the *Monsanto* standard. Dissatisfied with the Court of Appeals' unambiguous statement that it did exactly that, petitioner invites this Court to scrutinize the evidence, not for the purpose of clarifying an unsettled area of law or resolving a conflict among the circuits, but simply to second-guess the result reached by the Court of Appeals in applying the *Monsanto* standard. This would be a pointless exercise. Both the evidence and the Court of Appeals' judgment after reviewing that evidence are entirely consistent with *Monsanto*. The result fully satisfies *Monsanto's* holding that mere complaints followed by termination are not enough to infer a supplier-distributor price-fixing conspiracy, and that evidence tending to exclude the possibility of independent action is necessary.

There is no basis on this record for the Court to select this case as a vehicle to reconsider the rule of *per se* liability for vertical price-fixing. This issue was first raised by petitioner in its initial petition for certiorari, and has not been considered by

the Court of Appeals. Moreover, given the desire of Congress to retain the *per se* rule, reconsideration of the standard by this Court is unwarranted.

Finally, the Court should decline to review the decision of the Court of Appeals because that decision is interlocutory.

I.

The Decision Of The Court Of Appeals Is Fully Consistent With Monsanto

Respondent has conceded throughout this case that proof of concerted action is necessary, *i.e.*, that it must prove that Buckingham and Copper State "had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). This long-established principle is the essence of the *Monsanto* decision, which held that mere complaints from a rival distributor followed by termination are not enough for "a meeting of the minds," but rather, evidence must be offered "that tends to exclude the possibility that the manufacturer and nonterminated distributor were acting independently." *Monsanto*, 104 S.Ct. at 1471.[8]

Since respondent never relied upon complaints alone, but instead presented substantial evidence tending to exclude the possibility of independent action, *Monsanto* is entirely consistent with the result reached by the Court of Appeals.[9]

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[8] Although the Court referred to "direct" evidence of agreements between Monsanto and distributors to maintain prices (consisting of threats made by Monsanto to another distributor after Spray-Rite had been terminated (*see* 104 S.Ct. at 1471)), it relied upon circumstantial evidence to link the termination of Spray-Rite to the conspiracy. 104 S.Ct. at 1472. We do not understand the Court to have held or implied that direct evidence is *required* in such cases, or that the evidence presented by Spray-Rite constitutes a minimum level which plaintiffs must reach. The Court has consistently held that direct evidence is not necessary to prove an unlawful conspiracy. *E.g.*, *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969) (per curiam); *United States* v. *General Motors Corp.*, 384 U.S. 127, 142-43 (1966); *American Tobacco Co.* v. *United States*, 328 U.S. at 809-10.

[9] It is clear from the Court of Appeals' Memorandum Decision that it required "evidence of concerted action," and not simply evidence of Copper State's complaints followed by ADC's termination. The Court of Appeals

(Footnotes continued on following page)

The evidence in this case which tended to exclude the possibility of independent action was abundant. The Ahlburg Memorandum was the only document in the case which discussed Buckingham's reasons for the termination, and it referred to only one reason—price. Exh. 101, Resp.App. B. Ahlburg's statement that "I spoke to Bernie Gellerman and he swears he has not been doing any such pricing," when placed in the context of the other evidence, certainly permitted the inference of an understanding between Copper State and Buckingham that Copper State would not engage in the discounting which Buckingham found so offensive. The inference that Copper State would acquiesce to Buckingham's wishes regarding pricing was strengthened by Gellerman's promised "commitment" to Buckingham in exchange for the termination of ADC, a commitment backed by Gellerman's assurances that he regarded such discounts as a "stupid move" and swearing that he was not a price-cutter. Tr. 589, 591-93, 596-97, 712; Exh. 101, Resp.App. A.

The importance placed by Buckingham on a commitment by Copper State to toe the line on pricing was further bolstered by the evidence of Buckingham's desire to "firm up" Cutty Sark prices (Tr. 409-10); by Ahlburg's warnings to Braddock that discounting violated Buckingham philosophy and that Buckingham wanted "to outline [ADC's] discounts" (Tr. 221-23, 645); and by Lichtenberger's statement that ADC was terminated because it violated Buckingham's new philosophy (Tr. 481). Moreover, the jury observed the sharp conflict in the testimony of Gellerman, Ahlburg, and Lichtenberger on crucial issues (*see* note 5, *supra*), and was presented with evidence which thoroughly discredited the asserted nonprice reasons for the termination *(see* note 7, *supra*). In short, respondent presented substantial evidence "both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Monsanto,* 104 S.Ct. at 1471, n.9.[10]

(Footnotes continued from preceding page)
emphasized the evidence of "the pricing reasons for the termination," and Gellerman's "offer to let Buckingham have some control over price," *i.e.,* evidence of a meeting of the minds between Buckingham and Copper State to engage in resale price maintenance. Pet.App. C at 11a-12a.

[10] While differing in some respects, much of the evidence in *Monsanto* was a good deal less persuasive than the evidence in this case. For example, there was no document corresponding to the Ahlburg Memorandum which

(Footnotes continued on following page)

Petitioner devotes much of its argument to the contrary, nonconspiratorial inferences it would have this Court draw from the evidence. This exercise has little bearing on the issue as properly framed, which is whether the evidence meets the *Monsanto* standard with all reasonable inferences drawn in *ADC's* favor, not Buckingham's. Lacking a credible argument that the inferences which the Court of Appeals already found to be reasonably drawn in ADC's favor are insufficient in light of some higher standard set by *Monsanto,* Buckingham instead attacks the inferences themselves, asking the Court to reexamine the evidence and substitute its view for that of the Court of Appeals of what inferences reasonably can be drawn. However, petitioner provides no basis for this Court to alter the Court of Appeals' determination that an understanding between Buckingham and Copper State can be inferred from the evidence.[11]

(Footnotes continued from preceding page)

directly linked Spray-Rite's termination to pricing reasons and referred to price assurances from a competing distributor. There was no evidence of any conversation between Monsanto and a competing distributor which linked the termination of Spray-Rite, discussion of pricing philosophy, and a "commitment" by the competing distributor in the same conversation. In fact, there was no evidence of *any* complaints about Spray-Rite's pricing for the 15 months prior to its termination, although the Court held that such complaints could be inferred from evidence that some complaints occurred after the termination. 104 S.Ct. at 1473, n.14. As does Buckingham, Monsanto contended that it acted unilaterally, and offered nonprice reasons for the termination such as insufficient promotion and lack of technically trained personnel. *See Spray-Rite Service Corp.* v. *Monsanto Co.,* 684 F.2d 1226, 1239 (7th Cir. 1982), *aff'd,* 104 S.Ct. 1464 (1984). The Court held that "despite the sharp conflict in evidence the case properly was submitted to the jury." 104. S.Ct. at 1473, n. 14.

[11] Ahlburg's rehearsed denials to questions posed by his own counsel (Pet.App. H) hardly demolish respondent's version of the evidence. It would be a rare case indeed in which an alleged antitrust conspirator made such admissions on direct examination. Even if the precise words were not spoken between Ahlburg and Gellerman, an agreement can be implied from "a course of dealings or other circumstances as well as in any exchange of words." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809-10 (1946). A "knowing wink can mean more than words." *Esco Corp.* v. *United States,* 340 F.2d 1000, 1007 (9th Cir. 1965). *Cf. Girardi* v. *Gates Rubber Co.,* 325 F.25 196, 201-02 (9th Cir. 1963) (in light of the complaining distributor's interest, the jury was not obliged to accept as true his assertions that he did not ask the supplier to do something about plaintiff's pricecutting or to terminate plaintiff).

(Footnotes continued on following page)

Petitioner appeals to this Court as jurors to consider what it calls the "most probative piece of evidence" in the case: Braddock's letter, written prior to the inauguration of the Newman regime at Buckingham and more than a year before the events at issue in the case, requesting an exclusive distributorship. Contrary to petitioner's repeated assertion, it was far from "undisputed" that interbrand competition was promoted by the termination of respondent. Petitioner neglects to mention that Copper State already distributed Dewar's, another of the "big four," on an exclusive basis. Tr. 521-22. The termination of respondent thus *eliminated* interbrand competition between two of the four premium scotches in Arizona, since Copper State distributed and was in a position to set the prices for both. Of course, this was consistent with petitioner's avowed goal of establishing the price of Cutty Sark as equally as possible to the prices of J & B, Johnnie Walker Red, and Dewar's—in other words of eliminating price competition with these brands.[12]

(Footnotes continued from preceding page)

Moreover, petitioner conveniently omits Ahlburg's *cross*-examination (Tr. 588-664), in which he discussed the Gellerman meeting in significantly more detail. Tr. 589-96. Apart from his admissions that pricing was discussed, the jury could have discredited Ahlburg's direct testimony by observing his obvious discomfort at having to deviate from a set story on cross-examination:

> "Q. And Mr. Gellerman said to you that what Mr. Braddock is doing is stupid, correct?
>
> "A. I believe he was referring to the discounts with respect to the price raise we were going to take in May.
>
> "Q. Right. You were having a conversation about the fact there was going to be a price increase and also about the fact that here was Braddock engaging in a deep discount, right?
>
> "A. Mr. Mason—
>
> "Q. Yes, sir?
>
> "A. You would help me out a great deal if we could start chronologically, because I could probably get my story across better then." (Tr. 592:25-593:11.)

Ahlburg also indicated that his memory of the exact words spoken might have been a little hazy:

> "Let me explain something. I mean, since that conversation I have had a few unfortunate situations happen, like my house burned down." (Tr. 593:23-25.)

[12] As the court noted in *Continental T.V. Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers

(Footnotes continued on following page)

Even assuming the accuracy of petitioner's disputed factual contention that interbrand competition ultimately was promoted by the termination, the termination nevertheless was not immunized if it was substantially the product of an unlawful agreement to eliminate price competition. The existence of legitimate reasons for the termination "makes it neither more nor less probable that . . . [petitioner] acted in concert with others rather than unilaterally." *H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 943 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982). The test is whether the elimination of price competition, pursuant to a meeting of the minds between petitioner and Copper State, substantially contributed to the decision to terminate respondent. *Uniroyal Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350, 355 (S.D.N.Y. 1978); *see Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 143-44 (1968) (White, J., concurring). Petitioner stretches the Court of Appeals' reasoning beyond recognition by ascribing to it a belief "that evidence of pro-competitive benefits was not pertinent to determining whether there was sufficient evidence of a price-fixing conspiracy." Pet., p. 10. Nothing in the decision so indicates. Petitioner's attack on the Court of Appeals for its purported "decision"—nowhere stated in the opinion—"that a conspiracy may be inferred notwithstanding undisputed [sic] evidence that a termination was in the supplier's competitive self-interest" (Pet., p. 10) is likewise unwarranted.[13] All that the Court of Appeals determined was that petitioner's evidence, regardless of the weight the jury may ultimately give it, did not so far outweigh respondents' evidence as to compel a directed verdict. "The choice between two reasonable interpretations of the testimony properly was left for the jury." *Monsanto*, 104 S.Ct. at 1472, n.12.

(Footnotes continued from preceding page)

of the affected product, but quite as much *between* that product and competing brands." *Id.* at 52 n.18; original emphasis; *quoting White Motor Co.* v. *United States*, 372 U.S. 253, 268 (1963) (Brennan J., concurring). This case certainly fits that description.

[13] Although the elimination of interbrand price competition between Cutty Sark and Dewar's may have been in petitioner's "competitive self-interest" (Pet., p. 10), "the policy of the antitrust laws is not qualified or conditioned by the convenience of those whose conduct is regulated." *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948).

The contention that the Court of Appeals' unpublished decision "frustrates the economic objectives *Monsanto* sought to achieve" is also without merit. This argument requires the factual assumptions that only routine "complaints and inquiries" were made, that petitioner's actions were entirely unilateral, and that the termination promoted interbrand competition; all of these assumptions are disputed.[14] The evidence showed conduct which was far from "inevitable." After *Buckingham,* a supplier is still free to *unilaterally* terminate its distributor, even a price cutter, for whatever reasons it chooses (and an attorney may so advise his or her client); it is still not free to do so pursuant to concerted action with a competing distributor to eliminate price competition. The "Catch 22" perceived by petitioner and the district court is illusory. Had petitioner not engaged in actions which permitted the reasonable inference of action, it would have been free to terminate either wholesaler without fear of antitrust liability. The Court of Appeals' decision that the evidence permitted such an inference is fully consistent with *Monsanto.* [15]

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[14] Petitioner's assertion that complaints from rival distributors about price cutting are inevitable is contradicted by the record. Respondent *never* complained about Copper State's discounts on Cutty Sark (Tr. 208, 530); Braddock only referred to them when petitioner demanded an explanation for respondent's price cutting. The statement that "[i]n each case, the higher price wholesaler complained" (Pet., p.12) is simply wrong.

[15] Other decisions since *Monsanto* are consistent with the result reached by the court below. *See, e.g., Malley-Duff & Associates* v. *Crown Life Ins. Co.,* 734 F.2d 133, 142-144 (3d Cir.), *cert denied,* 53 U.S.L.W. 3417 (Dec. 4, 1984) (directed verdict on plaintiff's dealer termination claim reversed, applying *Monsanto* standard); *Jeanery, Inc.* v. *James Jeans, Inc.,* 1984-2 Trade Cas. (CCH) ¶66,278 (D. Ore, 1984) (summary judgment on dealer termination claim denied, applying *Monsanto* standard). *Roesch, Inc.* v. *Star Cooler Corp.,* 671 F.2d 1168 (8th Cir. 1982), *aff'd by equally divided court,* 712 F.2d 1235 (8th Cir. 1983) (en banc), *cert denied,* 104 S.Ct. 1707 (1984), cited by petitioner, was affirmed by an equally divided Court of Appeals and is of little, if any, precedential value. *See Neil* v. *Biggers,* 409 U.S. 188 (1972).

II.

This Is An Inappropriate Case For The Court To Reconsider The Per Se Rule. Such Reconsideration In Any Event Would Be Unwarranted

Petitioner's final argument is that the Court should use this case as a vehicle to reexamine the rule of *per se* illegality for resale price maintenance. This is a singularly inappropriate case for this purpose, however. Petitioner did not raise this issue on the initial appeal to the Court of Appeals, but waited to present it in its first petition for certiorari. The Court of Appeals did not consider the issue on remand, either. Moreover, although the district court never finally ruled on jury instructions, the case was tried by both sides under the assumption that the *per se* rule would be applied. This Court should not consider the issue in the first instance. *Monsanto,* 104 S.Ct. at 1469 n. 7; *Delta Air Lines, Inc. v. August;* 450 U.S. 346, 362 (1981); *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 147 n. 2 (1970).

As explained above, it is far from "undisputed" that respondent's termination pursuant to a price-fixing agreement was pro-competitive at either an interbrand or intrabrand level. Even if this case were in a more appropriate procedural and factual posture, however, there would still be no reason for this Court to accept petitioner's suggestion to change the law. The *per se* rule as applied to cases of this type has existed for over 70 years. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911). In recent years, Congress has reaffirmed its approval of this policy. As this Court explained in *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 51 n.18 (1977):

> "The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy.... Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade at the option of the individual States.... No similar expression of congressional intent exists for nonprice restrictions."

This congressional intent was again displayed when it passed (and the President signed) Public Law 98-166, 97 Stat. 1071 (1983), an appropriations measure which ordered the Department of Justice to cease spending such appropriations in attempts "to overturn or alter the *per se* prohibition on resale price maintenance in effect under Federal antitrust laws. . ." Particularly given the meager basis which this case would present, the Court should decline petitioner's invitation to reconsider the *per se* rule.

III.

The Court Should Deny Review Because The Court Of Appeals' Decision Is Interlocutory

In reversing the district court's order granting a directed verdict and remanding the case for trial, the Court of Appeals has placed petitioner in the same position it would have been in had the district court denied the motion in the first instance. Petitioner may yet prevail before a jury. If respondent wins the new trial and that judgment is affirmed on appeal, petitioner will still be able to present the same arguments to this Court which it now advances. "Except in extraordinary cases, the writ [of *certiorari*] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co.,* 389 U.S. 327, 328 (1967). This is not a case which justifies departure from the Court's traditional practice of denying review of interlocutory decisions.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

DATED: December 19, 1984

Respectfully submitted,

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APPENDIX A

Exhibit 101 (Tr. 113)

MEMORANDUM

PERSONAL & CONFIDENTIAL Date: April 29, 1981

To: Steve Karp From: Ken Ahlburg

Subject: ARIZONA

The state of Arizona is too small for two wholesalers selling our line. Forgetting all the standard cliches, shelf management is non-existent and uniform marketing that gets results cannot be coordinated with a dual.

This month, Arizona Distributors had a 5 case discount of $15.00 off on Cutty Sark (see attached), coupled with April being a buy-in, makes no sense. Plus, 5 case discounts do not get floors, 50 and 100 case discounts get the action. We sold a lot of goods in but the action to the consumer is not there.

I spoke with Jack Braddock regarding this, and his reason was that he felt that Copper State was always beating his deal by a dollar. By doing this, he would "show Copperstate".

In my opinion, "Showing Copper State" can and will be very detrimental to our over-all long term marketing of Cutty Sark.

I also spoke to Bernie Gellerman and he swears he has not been doing any such pricing.

I am recommending we have Copper State handle our complete line on an exclusive basis.

Regards,

KA:hb

ARIZONA DISTRIBUTING COMPANY

APRIL 20TH THRU APRIL 30TH

CUTTY SARK SCOTCH

(ALL SIZES ASSORT)

		1 CASE	3 CASES	5 CASES
1.75 LITER	(103.80)	10.00	12.00	15.00
LITER	(125.40)	10.00	12.00	15.00
750 ML	(94.80)	8.00	10.00	12.00
500 ML	(138.00)	10.00	12.00	15.00
200 ML	(122.40)	10.00	12.00	15.00

	NET BOTTLES		
	1 CASE	3 CASES	5 CASES
1.75 LITER	15.64	15.30	14.80
LITER	9.62	9.45	9.20
750 ML	7.24	7.07	6.40
500 ML	5.34	5.25	5.13
200 ML	2.35	2.30	2.24

(1.75 LITER AND LITER STILL ASSORT IN PREMIUM FAMILY BAR PLAN)

SPECIAL

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BUCKINGHAM CORPORATION, a Delaware Corporation, *Plaintiff,* v. ODOM CORPORATION, a Delaware Corporation, dba ARIZONA DISTRIBUTING COMPANY, *Defendant,* ODOM CORPORATION, dba ARIZONA DISTRIBUTING COMPANY, *Counterclaimant-Appellant,* v. BUCKINGHAM CORPORATION; MAZEL CORPORATION, an Arizona Corporation; COPPER STATE DISTRIBUTORS, INC., an Arizona Corporation, *Counterdefendants-Appellees.*	**Nos. 81-6046, 82-5241** **Order**

Before: POOLE AND BOOCHEVER, Circuit Judges, and MCNICHOLS,* District Judge.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Ray McNichols, Senior United States District Judge for the District of Idaho, sitting by designation.

(3)

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 84-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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9pp

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
ARGUMENT	1
I. The Conflict with *Monsanto*	1
II. Reviewability of the Questions Presented	2
CONCLUSION	4

TABLE OF AUTHORITIES

Cases: PAGE

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967)..... 3

Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982) 3

Copperweld Corp. v. *Independence Tube Corp.*, 460 U.S. 1035 (1983) 3

Dr. Miles Medical Co. v. *John D. Park & Sons*, 220 U.S. 373 (1911)..... 3

Jacksonville Bulk Terminals, Inc. v. *International Longshoremen's Ass'n.*, 457 U.S. 702 (1982) 3

Monsanto Company v. *Spray-Rite Service Corporation*, 104 S. Ct. 1464 (1984) ..... *passim*

Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972) 3

Time, Inc. v. *Pape*, 401 U.S. 279 (1971)..... 3

Wood v. *Strickland*, 420 U.S. 308 (1975) 3

Miscellaneous:

Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, filed Jan. 3, 1983, *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (U.S.).. 3

IN THE

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I.

THE CONFLICT WITH MONSANTO

Respondent characterizes the petition as an invitation to this Court "simply to second-guess the result reached by the Court of Appeals in applying the *Monsanto* standard." (Br. in Opp. 8) However, even respondent's adversarial summary of the evidence (Br. in Opp. 2-5) shows that the Ninth Circuit could not have followed the requirement in *Monsanto* that "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 104 S. Ct. at 1471.

First, respondent incorrectly states that the principal piece of evidence upon which it relies—the Ahlburg Memorandum—re-

ferred only to price as the reason for ADC's termination. (*See* Br. in Opp. 10) Respondent completely ignores the very first paragraph of the memorandum which focuses entirely on the competitive disadvantages of Buckingham's having two Arizona wholesalers:

> The state of Arizona is too small for two wholesalers selling our line. Forgetting all the standard cliches, shelf management is non-existent and uniform marketing that gets results cannot be coordinated with a dual. (Pet. 22a)

Buckingham's procompetitive reason to terminate one of its distributors—and, like its competitors, have an exclusive wholesaler—was conceded by ADC's president. (*See* Pet. 3-4, 20a) Thus, there was undisputed evidence which precluded a finding that the possibility of independent action was excluded.

Next, respondent has combed the record for every instance in which Buckingham uttered the word "price" (or even "programming") in the presence of one of its wholesalers. At most, these references reveal the type of conversations expressly allowed by *Monsanto*. Under *Monsanto*, even "the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions." 104 S. Ct. at 1470. Nor does Buckingham's desire to "firm up" Cutty Sark prices (Br. in Opp. 10) warrant an inference of conspiracy since "the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the *Colgate* doctrine allows." *Id.*

II.

REVIEWABILITY OF THE QUESTIONS PRESENTED

Respondent's argument that certiorari should be denied because the Court of Appeals' decision is "interlocutory" (Br. in Opp. 16) is simply erroneous. The directed verdict was based on a full trial record. The principal question presented for

review here—the quantum of evidence necessary for a dealer termination case to go to the jury on a price-fixing charge—would be no less ripe for review now than at the end of a second trial.[1] Moreover, even if the order below were interlocutory, that would not preclude certiorari since this Court has often reviewed interlocutory orders which present important questions.[2]

The questions here are important. They concern (among other things) the interplay between the *per se* rule and the quantum of proof required to infer a vertical price-fixing conspiracy, as well as the propriety of applying the *per se* rule in such cases. The Department of Justice asked this Court in *Monsanto* to reconsider the rationale of *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373 (1911). Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, filed Jan. 3, 1983, at 15-18, *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (U.S.). In light of the submission of an amicus brief by the United States in *Monsanto* and the continued interest of the Government in the questions raised by Buckingham's petition, *see* Pet. 14 n.9, the Court may find it helpful to request an amicus brief from the United States with regard to this petition. *See, e.g., Copperweld Corp.* v. *Independence Tube Corp.*, 460 U.S. 1035 (1983).

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1 *See, e.g., Wood* v. *Strickland*, 420 U.S. 308 (1975), *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), and *Time, Inc.* v. *Pape*, 401 U.S. 179 (1971), in which this Court granted certiorari to review a court of appeals' reversal of a directed verdict. Compare *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967), cited by respondent (Br. in Opp. 16), where the questions presented were hypothetical since the circuit court had merely ruled on "various legal [contempt] issues" but had remanded to the district court "to consider whether there had in fact been a contempt." 389 U.S. at 328.

2 *See, e.g., Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n.*, 457 U.S. 702 (1982); *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the Court should grant a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

Dated: January 9, 1985

Respectfully submitted,

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No. 84-806

In the Supreme Court of the United States

OCTOBER TERM, 1984

BUCKINGHAM CORPORATION, PETITIONER

v.

ODOM CORPORATION,
d/b/a/ ARIZONA DISTRIBUTING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF AUTHORITIES

Page

Cases:

Barnes v. *Arden Mayfair, Inc.*, No. 84-3621 (9th Cir. Apr. 15, 1985) 6

Landmark Development Corp. v. *Chambers Corp.*, 752 F.2d 369 6

Monsanto Co. v. *Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984) 4, 5, 6

Ross v. *Moffitt*, 417 U.S. 600 6

Statute and rule:

Sherman Act § 1, 15 U.S.C. 1 ..... 2, 5

9th Cir. R. 21(c) 6

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. Petitioner, the Buckingham Corporation (Buckingham), is the American importer of Cutty Sark brand scotch whisky. For some time prior to 1981, Buckingham distributed Cutty Sark in Arizona through two distributors, respondent Arizona Distributing Company (ADC) and Copper State Distributors, Inc. (Copper State). This lawsuit arises out of Buckingham's termination of ADC and appointment of Copper State as its exclusive distributor of Cutty Sark in Arizona.[1] On August 25, 1981, approximately one week after it notified ADC of the termination,

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[1]Respondent does not dispute that it was in Buckingham's competitive interest to move from a dual to an exclusive distribution scheme for the Arizona market. See Tr. 251-253; Pet. App. 20a.

Buckingham sued in the district court for a declaratory judgment that the termination was lawful. ADC counterclaimed that the termination was part of a conspiracy by Buckingham and Copper State to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

The case proceeded to trial before a jury. The record shows little disagreement concerning the events preceding the termination, although the parties sharply dispute the inferences to be drawn therefrom.

For a ten-day period in late April 1981, ADC substantially reduced its case price on Cutty Sark. Copper State's president, Bernard Gellerman, telephoned Buckingham's senior vice president, Kenneth Ahlburg, to complain about ADC's discount and to request that Ahlburg investigate. Ahlburg, on instructions from Buckingham's senior vice president, Stephen Karp, went to Arizona to assess the situation. Ahlburg met first with ADC's president, Jack Braddock, who explained the reason for the discount.[2] Ahlburg told Braddock that the discount was inappropriate, and that "in the future" Buckingham wanted to "have a say in the programming of the brand."[3] Later that same day, Ahlburg met with Gellerman, who said that ADC's discount was "stupid," and that Copper State had not engaged in discounting of the sort ADC claimed. Gellerman promised that if Copper State were appointed exclusive distributor of Cutty Sark he would "make this kind of

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[2]Braddock claimed that Copper State consistently offered greater discounts than ADC, and that ADC's ten-day promotion was intended to "show the competition" that it was "still in the business of selling Cutty Sark." Tr. 218.

[3]Tr. 222. There was conflicting testimony regarding whether the term "programming" encompassed pricing and discounts, or was instead limited to non-price marketing strategy, *e.g.*, advertisements and retail displays. *Compare* Tr. 223 *with* Tr. 122.

commitment, whatever it takes to build this brand I'm here to do it." Tr. 596, 713. Ahlburg in turn said that he would recommend that Copper State be made Buckingham's exclusive distributor of Cutty Sark in Arizona.

On April 29, 1981, Ahlburg sent a memorandum to Karp, explaining that "Arizona is too small for two wholesalers selling [Buckingham's] line * * *. [U]niform marketing that gets results cannot be coordinated with a dual." Pet. App. 22a. The memorandum also outlined Ahlburg's view that ADC's discount was poorly timed, ineffective at generating extra sales to consumers, and "can and will be very detrimental to our over-all long term marketing of Cutty Sark." *Ibid.* Finally, the memorandum reported Gellerman's denial that Copper State priced its products so as to "beat [ADC] by a dollar," *ibid.*, and closed with Ahlburg's recommendation that Copper State be appointed Buckingham's exclusive Arizona distributor. On August 17, 1981, after investigating Copper State's financial resources and stability, Buckingham informed ADC that it was to be terminated. Tr. 135-139.

At the close of ADC's evidence, the district court granted the petitioner's motion for a directed verdict (Pet. App. 14a-17a). The court concluded that "whatever was said, I can't find that what Mr. A[h]lburg said to Mr. Braddock was coercive. * * * I can't find anything in the evidence from which to support a finding that Mr. Gellerman agreed that if he had the exclusive he would follow Buckingham's suggestions as to prices * * *." *Id.* at 16a.[4]

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[4]The court also noted that because both ADC and Copper State had asked to be appointed Buckingham's exclusive distributor, and both had at one point priced below the other, "Buckingham is in a no-win situation in this case." Pet. App. 17a.

In an unpublished opinion, the court of appeals reversed and remanded for trial (Pet. App. 10a-13a). It held that "[a]lthough [ADC's] evidence was weak, there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict." *Id.* at 11a. In the court's view, the Ahlburg memorandum, "which focused on the pricing reasons for the termination," combined with "Gellerman's offer to make a 'commitment' in exchange for an exclusive distributorship," was "sufficient * * * to support a jury verdict in [ADC's] favor by reasonable persons." *Id.* at 11a-12a. The court reasoned that although "Gellerman might have only meant a commitment to sell the product aggressively, a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price." *Id.* at 12a.

Buckingham filed a petition for a writ of certiorari (No. 82-1787) on April 19, 1983. On April 2, 1984, this Court granted the petition, vacated the judgment of the court of appeals, and remanded for reconsideration in light of *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984).

On remand, after supplemental briefing, the court of appeals, with one judge dissenting, issued an unpublished order reinstating its initial disposition of the case (Pet. App. 7a-9a). The majority held that its prior opinion had "applied the same test as required by *Monsanto* * * * namely, that there be sufficient evidence to overcome a motion for a directed verdict on the question of whether there was a common scheme * * * designed to achieve price control, and that [ADC] was terminated as a result." Pet. App. 7a-8a. Judge Poole dissented. He concluded that ADC's evidence was "[a]t best * * * 'highly ambiguous'," and therefore insufficient to withstand a motion for directed verdict under *Monsanto*. Pet. App. 9a.

In *Monsanto,* this Court ruled that evidence that a manufacturer terminated one distributor following complaints by other distributors about price cutting is insufficient to support a finding of concerted action under Section 1 of the Sherman Act. Instead, a plaintiff must produce "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. * * * [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " Slip op. 9 (citation omitted). The standard stated in both decisions of the court of appeals in this case does not conflict with the standard announced in *Monsanto.* Thus, the primary question in this case is whether that standard was properly applied—a wholly factbound issue.

For the reasons set forth by Judge Poole in his dissent, we believe that the evidence in this case is weaker than the evidence deemed sufficient in *Monsanto,*[5] and we believe also that the district court correctly granted the motion for a directed verdict.[6] But, although we think the decision below

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[5]In *Monsanto* the plaintiff presented "substantial *direct* evidence of agreements to maintain prices," slip op. 10 (emphasis in original), and circumstantial evidence that the plaintiff was terminated as a result of its price cutting. *Id.* at 10 n.10. By contrast, the evidence the court of appeals found sufficient to support an inference of conspiracy here—Gellerman's statement that he was willing to do whatever was necessary to promote Cutty Sark—is both circumstantial and "highly ambiguous." *Monsanto,* slip op. 8. Similarly, the evidence relied on by respondent to establish that ADC was terminated because of its price cutting—the Ahlburg memorandum—is, at best, ambiguous. On its face the document indicates that Ahlburg's objection was not based simply on ADC's discount program, but instead on the fact that the discount was poorly structured and poorly timed.

[6]As this Court explained in *Monsanto,* complaints by rival distributors are insufficient to support an inference of conspiracy because they are "natural [and] unavoidable." Slip op. 8. *A fortiori,* Gellerman's

is incorrect, we do not believe that further review is warranted simply to determine whether the court of appeals has correctly applied controlling law in the present interlocutory posture of the case. Cf. *Ross* v. *Moffitt*, 417 U.S. 600, 616-617 (1974).

Nor do we believe that this decision threatens to undermine this Court's decision in *Monsanto*. Both the initial and later dispositions of the Ninth Circuit are unpublished, and are therefore devoid of precedential value "except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." 9th Cir. R. 21(c). And more recent decisions in the Ninth Circuit are consistent with *Monsanto's* teaching that "highly ambiguous" evidence cannot support an inference of an agreement to fix prices, particularly where there is "strong legitimate business motivation for [challenged] conduct." *Landmark Development Corp.* v. *Chambers Corp.*, 752 F.2d 369, 372 (1985); *Barnes* v. *Arden Mayfair, Inc.*, No. 84-3621 (Apr. 15, 1985) (affirming grant of summary judgment for defendant where plaintiff's evidence as to conspiracy consisted solely of complaints by competitors).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

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statement to the effect that he would do whatever was necessary to promote Cutty Sark is unobjectionable and precisely what a distributor in Copper State's position would be expected to say.

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No. 84-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

PAGE

Argument 1

Conclusion 5

TABLE OF AUTHORITIES

Cases:

Monsanto Company v. *Spray-Rite Service Corporation*, 104 S. Ct. 1464 (1984) ..... *passim*

Miscellaneous:

82-914 Br. for the United States as Amicus Curiae on Petition for Writ of Certiorari (filed Jan. 3, 1983) ... 4

Buckingham case revives "Fair Trade" question, 3 Computer & Software News No. 17 (April 29, 1985) 2, 1a

H.R. Conf. Rep. No. 952, 98th Cong., 2d Sess. (1984) 3

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On Friday, May 24, 1985, seven weeks after the Court invited the Solicitor General to express the views of the United States in this case, the government served and filed a typescript version of its memorandum as amicus curiae. Petitioner, The Buckingham Corporation, submits this supplemental brief to make two brief comments on the government's memorandum.

1. The government agrees that "the district court correctly granted the motion for a directed verdict" and that the court of appeals' decision "is incorrect." Nevertheless, the government says that the petition should be denied because "the primary question in this case is whether [the] standard [of *Monsanto Company* v. *Spray-Rite Service Corporation*, 104 S. Ct. 1464 (1984)] was properly applied—a wholly factbound issue." The government's description is incorrect, and inconsistent with

other statements in the government's own memorandum. It seriously underestimates the importance of the issue presented here.

In the first place, the case is not "factbound," to the extent that term conveys the impression that the case turns on disputed questions of fact. As the government's submission states, "the record shows little disagreement concerning the events preceding the termination, although the parties sharply dispute the inferences to be drawn therefrom." As the government's memorandum also shows, the determinative events are few in number. The question presented is a legal one—whether the standard of *Monsanto* was correctly applied to the commonplace and largely undisputed circumstances of this case, in accordance with this Court's remand to the Ninth Circuit.

The proper application of *Monsanto* is an issue of the utmost importance to hundreds (if not thousands) of firms that distribute their products through independent dealers. As the government's memorandum acknowledges, the evidence presented here was considerably weaker than that considered in *Monsanto*; if a case can get to the jury on the basis of the showing made by respondent here, the termination of dealers in the interest of economic efficiency will be impossible as a practical matter, and the underlying objective of *Monsanto* will be defeated.

Published or unpublished, the court of appeals' decision is an incorrect ruling that will influence the advice of counsel and the behavior of businessmen in ways that undercut the policies articulated in *Monsanto*. The decision has already been reported in the primary service used by antitrust counsel. 47 Antitrust & Trade Reg. Rep. (BNA) 478 (September 13, 1984). It has also received substantial attention in trade publications. *See, e.g., Buckingham case revives "Fair Trade" question*, 3 Computer & Software News No. 17, at 4 (April 29, 1985), which stated:

> Although the Supreme Court had not yet agreed to review [the Ninth Circuit's] decision at presstime, the

> *Buckingham* case is being watched closely by Justice Department antitrust officials, Congress and industry groups.
>
> The reason this case is attracting so much attention is that the outcome of the dispute will affect the pricing and distribution of virtually all consumer and business products, including personal computers and software.[1]

The existence of other inconsistent Ninth Circuit decisions adds to the confusion and constitutes a reason for granting certiorari, not denying it.

2. The government's memorandum does not mention Point III of the petition for certiorari, which contends that, if there is to be another trial, this Court should direct that the rule of reason, rather than the *per se* rule, be applied in determining whether there was unlawful vertical price-fixing. The omission is the product of a commitment made to Congress by former Assistant Attorney General McGrath in the course of congressional consideration of the Department of Justice appropriations bill for fiscal year 1985. Mr. McGrath assured the conference committee that no funds appropriated for the Department would be used to advocate application of the rule of reason, rather than the *per se* rule, in vertical price-fixing cases. See H.R. Conf. Rep. No. 952, 98th Cong., 2d Sess. 40-41 (1984):

> Amendment No. 142: Deletes a general provision proposed by the House which would have prohibited funds appropriated by this Act for the Justice Department and the FTC from being used to alter the per se rule on resale price maintenance. The conferees deleted this provision as a result of assurances by the Assistant Attorney General for Antitrust that the Justice Department will respect the position of the conferees on this issue. The conferees remain adamantly opposed to any Justice Department or

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1 The full text of the article is annexed as Appendix A.

FTC actions that would alter or overturn the prohibition on resale price maintenance and expect that the current law on this matter will be properly enforced.

In *Monsanto*, the United States filed a brief as amicus curiae in which it urged the Court "fully to reexamine the legal status of resale price maintenance" and to address the question whether the *per se* rule should apply to vertical price restrictions. 82-914 Br. for the United States as Amicus Curiae on Petition for Writ of Certiorari 15-18 (filed Jan. 3, 1983). Under the circumstances, the government's failure to discuss the *per se* issue in its memorandum here should not be deemed a departure from the position taken by the government in *Monsanto*.[2]

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2 The Court's decision in *Monsanto* did not address the question whether the *per se* doctrine should be applied in vertical price-fixing cases, because the question was not raised below. 104 S. Ct. at 1469-1470 n.7. This issue was squarely presented at the trial of the case at bar.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and Reply Brief, we ask the Court to grant a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

Dated: May 30, 1985

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Appendix A

WASHINGTON REPORT

Buckingham case revives 'Fair Trade' question

WASHINGTON—May manufacturers legally terminate existing distributors in response to shifts in the marketplace? Certainly—it happens all the time, particularly in fast-changing fields like the computer and software industry.

But what if the terminated distributor happens to be a discounter or a suspected diverter believed to be supplying unauthorized price-cutting retailers? And what if the termination occurred after competing distributors complained to the manufacturer of the discounter's pricing practices?

Supposedly, those questions were answered by the Supreme Court last year in the *Monsanto* resale price maintenance ruling.

In that case, the Court upheld the *per se* or automatic illegality of RPM conspiracies between dealers and suppliers, but established tough new rules of evidence for establishing the existence of such a conspiracy.

Among other things, the Supreme Court held that "complaints about price cutters" are "natural" and "unavoidable reactions by distributors to the activities of their rivals."

Allowing an illegal RPM conspiracy "to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct," the Court said in *Monsanto*.

Now, however, a new case has reached the Supreme Court charging that the lower courts are not following the Monsanto doctrine and asking for sweeping changes in the antitrust ground rules governing resale price fixing.

In that case, a liquor importer (Buckingham) terminated one of its Arizona Cutty Sark Scotch wholesalers following discussions with a competing distributor about the firm's discount pricing practices.

The United States Court of Appeals for the Ninth Circuit ordered Buckingham to stand trial for engaging in an alleged RPM conspiracy despite admittedly weak evidence of any such agreement.

According to attorneys for Buckingham, the Ninth Circuit's decision ignores the Supreme Court's *Monsanto* standard which requires that RPM charges be dismissed unless there is evidence "that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently."

The Appeals Court ruling "undermines the important economic objective" that the Supreme Court sought to achieve in *Monsanto*, and as a result "many inefficient distribution systems will remain unchanged because" suppliers will be reluctant to terminate any discounting dealer or distributor, they argued.

Although the Supreme Court had not yet agreed to review that decision at presstime, the *Buckingham* case is being watched closely by Justice Department antitrust officials, Congress and industry groups.

The reason this case is attracting so much attention is that the outcome of the dispute will affect the pricing and distribution of virtually all consumer and business products, including personal computers and software.

Buckingham is not merely asking that the Court reverse the Ninth Circuit on the standard of evidence in dealer termination cases. The company has also asked the Supreme Court to overturn the longstanding legal precedent under which all resale price maintenance agreements have been banned as *per se* illegal under the Federal antitrust laws.

Because "resale price maintenance is frequently procompetitive, the *per se* rule should not apply to any vertical price restrictions," lawyers for the supplier told the Supreme Court.

Although the Justice Department made a similar argument in last year's *Monsanto* RPM case, the Court dodged the question of the legality of resale price fixing conspiracies because it was never directly raised by either of the parties in that case.

In *Buckingham*, the *per se* issue is a central element in the supplier's case, and many legal experts believe the Supreme Court may finally be forced to decide whether the United States will return to the "Fair Trade" era.

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TABLE OF CONTENTS

	Page
ARGUMENT.....	1
CONCLUSION.....	4

TABLE OF AUTHORITIES

Monsanto Company v. Spray-Rite Service Corporation, 104 S.Ct. 1464 (1984).....	1, 2, 3, 4

Respondent The Odom Corporation, d/b/a Arizona Distributing Company, respectfully submits this supplemental brief in opposition to the petition, and in response to the supplemental brief of petitioner and the "Memorandum of the United States as Amicus Curiae."

ARGUMENT

1. The government correctly recognizes that no substantial legal issue is presented, and that the court of appeals applied the standard of Monsanto Company v. Spray-Rite Service Corporation, 104 S.Ct. 1464 (1984), in reversing the directed verdict. Whether or not that standard was "correctly" applied turns entirely on the resolution of disputed facts and the inferences to be drawn from those facts. If it were to hear this case, the Court would merely be substituting its own analysis of the facts for that of the court of

appeals on an issue where the substantive law is undisputed.

Although the invitation to the Solicitor General to express the government's view may have focused some undue attention on this case, that should not bootstrap the court of appeals' decision beyond its inherent insignificance. The uncertainty in the business community posited by petitioner, if it exists, reflects no more than the inevitable by-product of a law where each case turns on its own facts. Petitioner's claim that the decision below, which has no precedential value, somehow makes dealer termination in the interest of economic efficiency "impossible as a practical matter" is unfounded. As the government points out, other decisions since Monsanto have affirmed such legitimate supplier conduct.

Of course, we disagree with the government's analysis of the evidence; that evidence, if anything, is stronger here than was the case in Monsanto. See "Brief In Opposition To Petition" at 10-11, n.10. However, the possibility that this Court might agree with the government's view of the evidence does not warrant review. The Court merely would be performing the same task already performed by the court of appeals, which applied the correct substantive law. Such an exercise would be particularly unwarranted given the interlocutory posture of the case. See "Brief In Opposition To Petition" at 16.

2. As discussed in the "Brief In Opposition To Petition" at 15-16, petitioner's invitation tc the Court to reconsider the per se rule should be rejected. The position of Congress that the law should remain the same could not be clearer, and petitioner's supposition

that the Department of Justice still adheres to the views of former Assistant Attorney General Baxter on this issue is far from certain. Moreover, as in Monsanto, the question was neither determined by the district court nor raised in the initial appeal to the court of appeals.

CONCLUSION

For the foregoing reasons, as well as those stated in the "Brief In Opposition To Petition" and the

"Memorandum Of The United States As Amicus Curiae," the petition should be denied.

Respectfully submitted,

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